

SJ 7 Workgroup  
Meeting Minutes  
April 9-10 2008

**April 9**

**Workgroup members present:** Betty Beverly, Gayla Brown, Webb Brown, Tom Gregg, George Groesebeck, Mike Hanshew, Rose Hughes, Shirley Powell, Karolyne Redding, Al Ward (Claudia Clifford), Jeff Buska, Jill Caldwell, Becky Fleming-Siebenaler.

**Welcome and brief summary of last meeting**

Reviewed and approved the minutes from the February 20-21, 2008 meeting.

Handouts provided to the workgroup include: Agenda; SEIU Initiative; Consensus on definitions; DOJ SJ 7 Work Group questions regarding background checks; Memo regarding Dissemination Limits of Criminal History Information; Disqualifying Event Summary (Draft 3); 10 State Summary Regarding Appeals Process; Recommendation for Appeals Process in Montana; Options for Background Checks; and Administrative and Process Discussion Items.

Jeff worked with agency legal staff and received some comments. The attorneys had some small changes to the definitions since the last meeting and some were incorporated into the definitions document. No substantive changes were made to the definitions that were discussed in previous meetings.

Before going through agenda, Jeff talked about the SEIU initiative, and handed out latest version. This is the one that went to AG and SOS office. There is broad language regarding background checks and Jeff wanted the work group to know this is out there and that it relates to the work we have been doing regarding background checks.

Jeff contacted staff at Department of Labor and Industry (DLI) and asked for help identifying a count of employees, based upon our service setting list that could be affected by looking at unemployment insurance information. The report we received from DLI identified approximately 42,000 people were employed in these setting last year. This appears reasonable and will be the base number of employees we will use for cost analysis. The Department will use this figure plus an estimate of the home based care employees from SLTC and DSD to identify a total estimate of the employees that would be subject to a background check. This total may be approximately 50,000 employees.

Jeff had a brief discussion about background check companies and the information they offer. Not much information is available, but we were able to identify a few companies providing this service as noted in the handout. Jeff also discussed the agency survey we are conducting on Survey Monkey and discussed the preliminary results with the workgroup. After the close date of the survey, we will be compiling this information for the work group.

DPHHS does have a placeholder in the agency requests for legislation related to background checks. Department is having discussions with the governor's office and is trying to decide whether this will come from agency legislation or a committee bill. Jeff will be working on the report that will satisfy the requirements of SJ 7, all on the work group may not agree with it. Jeff would like to have a draft for the workgroup to review and comment on in June.

### **DOJ Information regarding fingerprints and availability of results (Joe Wodnik and David Blade)**

Refer to handouts provided by DOJ. The first document is the one titled SJ7 WG Questions regarding background checks and the second document is the one dated 4/7/2008 from Stuart Segrest to Ali Bovington regarding Dissemination Limits of Criminal History Information. David Blade provided an overview of the documents and the workgroup discussed the documents regarding fingerprint cost, timelines to process checks, and quality. David clarified that the whole RAP sheet can be released with a consent form. He passed out a sample RAP sheet.

Jeff clarified that if DPHHS is the clearinghouse, employers will be given this information with a thumbs up or thumbs down regarding hits against the disqualifying criteria, as opposed to getting the whole RAP sheet. The workgroup was reminded that the agency proposal on the table is to grandfather in current employees and require background checks on new employees after a certain date. With the high turnover rate in the industry, we estimate it should take 3-5 years before almost everybody is checked.

It was asked if DOJ may take longer than the 5-10 days with an influx of requests. Dave thought that the potential problem with this timeline would be related to the error rate regarding the quality of the fingerprints. Also, with the grandfathering in of existing employees, there will not be an explosive demand. The workgroup discussed again the importance of the timeliness of the process to complete the processing of the fingerprint checks via DOJ and the FBI. Long delays in the administrative process with DOJ and DPHHS area concern of providers and will impact the success of a fingerprint requirement.

### **Discussion disqualifying events**

At the request of the workgroup from the February 2008 meeting the department formed a subcommittee including staff from QAD, APS, and DOJ as well as DPHHS legal staff to identify and define a list of disqualifying crimes. They focused on 3 areas: what is a permanent disqualifier; what can be aged out; and what do we not want to consider. Through a comprehensive discussion this group identified 48 permanent disqualifiers and 41 aged out offenses. These are identified in the handout titled Disqualifying Events Summary (Draft #3). The workgroup discussed and agreed that permanent disqualifiers should be in statute, the aged out offenses in rules. DPHHS would need authority in the statute for rule making authority in this area. The committee knows that comparisons between same crime and different wording between states will be a complicating factor that needs to be addressed by DOJ and DPHHS. The work group agreed with the permanent and aged out offenses as proposed in the document.

### **Public comment**

None.

### **Discussion Appeals Process**

Jeff identified two handouts for the workgroup related to this agenda item. One handout is titled Appeals Process Recommendation for Appeals Process In Montana, April 2008 and the other is 10 State Summary of Data Collection Regarding Appeals Process, March 2008. Jeff indicated the state is looking at two separate appeals processes; one to determine the accuracy of the results of the criminal information, and one to see if an employee warrants the public trust. The cost of a record appeal through DOJ is \$10, but they have some discretion to waive that fee. If DOJ has to go to the FBI, there is no fee waiver.

Becky explained the handouts; obtaining information from the other states was hard to get regarding numbers of appeals. The department proposes an appeals process similar to NM with a non-adversarial administrative review. If after notification of the results of the administrative review and the individual disagrees with the determination they can request a Fair Hearing through QAD. It was noted that it needs to be clear that approvals by this process do not guarantee hiring by an employer. Ali Bovington had some concerns with the appeals process and the state taking on liability. The workgroup discussed the proposed process and generally agreed that an appeals process is necessary and the department should be provided the authority for developing administrative rules to refine the process.

#### **Public comment**

None.

Meeting adjourned!

### **April 10**

#### **Review of Options for Background check process**

The SJ 7 resolution calls for a study of fingerprint based background checks, but based upon the discussion at the February meeting the workgroup identified a couple of other options that should be addressed in the report. Based upon the options identified and briefly discussed in the February meeting, department staff and DOJ staff reviewed those options to identify the pros and cons of each option. Jeff referred the workgroup to the handouts SJ 7 Options for Background Checks and page 4 of the DOJ document. All options have the same list of disqualifying events and appeal process.

Option 1 covers a full fingerprint background check requirement, Option 2 covers a requirement for background checks and the State prescribes the process of a progressive check, and Option 3 covers a general requirement for some type of criminal background check.

Jeff reviewed the handout with the workgroup and opened discussion for comments changes or suggestions.

Option 1: Full Fingerprint Background Check. David Blade informed the workgroup that Washington is a new WIN state. The process may be easier if we only used WIN checks when appropriate. This may reduce the cost. It is a good resource, and cheaper. Discussion identified that use of the WIN does require some risk analysis by the provider to determine the prior work history and residence of the employee.

Option 2: Criminal background checks required and the State prescribes a process of a progressive check. The employer makes the decision that the fingerprint check needs to be done after the name based check. Name based checks have weaknesses previously discussed, name changes, exact spelling, and accurate information. The registry would be limited and would result in only including those employees who had the fingerprint check done. It could result in a registry that would be more of a do not hire list, than as a resource to employers. Al Ward identified that 14% of employees provide false info regarding their names which makes a name based system subject to false responses.

Option 3: Some type of background check required. Employer has policies and procedures to determine their process. Some work group members thought this option does not meet

requirements of the resolution but still feel like we need to give the options as part of the report. It is more than we have now.

Discussion regarding the Pros and Cons handout resulted in the following suggestions and changes:

PRO:

- (all options) This legislation may have a sentinel effect to job applicants.
- (all options) Ensure confidence from the public that we are protecting the vulnerable population, another mechanism, not a guarantee
- (Option 1 and 2) A protection for employers as well (lawsuits & liability).
- (Option 3) Provider driven.
- (Option 1 and 2) Registry will eventually make most checks cheap and fast.

CON:

- (all options) There is a DPHHS administrative cost.
- (Option 3) All information is public, arrests are public information.
- (Option 2 & 3) there is a concern of fingerprint security, may be considered invasive.
- (Option 1) has a significant increase in workload to DPHHS.
- (Option 2) Decision making complicates it for facilities.
- (Option 2) Worry that there are Montana residents that commit crimes in other states.
- (Option 2 & 3) An employer cannot get a national check unless fingerprints are utilized.
- (Option 2 & 3) Does not meet requirements of resolution.
- (Option 3) has just a bad actor registry.
- (all options) The cost, hassle, and timing of doing a fingerprint background check.

Several members of the workgroup brought up the question of how this is going to be paid for and by whom. Jeff indicated that he understands that the workgroup feels this is something DPHHS should be paying for, at least all or in part. He will look into seeing if Medicaid matching funds can be provided or claimed for administrative functions or as a benefit. There was general concern from the workgroup about having employees pay the cost of the background checks. Many felt this was a cost employees, especially those on the lower end of the pay scale cannot afford to pay, and may result in additional burden on the workforce issues.

### **Process and Administrative Activities for a system of Background checks progress/methodology for estimating costs.**

Jeff identified the handouts for this discussion. There are three pages, one for each option, entitled Administrative and Process Discussion Items. Jeff outlined the documents and the workgroup discussed the handouts.

There was concern from the workgroup about an employee applying at more than one location and which employer would be responsible for getting the background check completed. It is a good question as an individual may be applying for a job at more than one employer at a time. This was discussed and determined that it needed to be tracked and handled administratively by DPHHS and DOJ. This is where the registry would come in handy to identify a background check is already in process by another prospective employer.

It was suggested to keep the outline for Option 1 but consider changing Option 2 and 3 to only identify items that would change. Indicate at the beginning of Option 2 and 3 that the

administrative and process items are the generally same except for the following items. Jeff indicated the documents would be changed to reflect this suggestion.

The workgroup generally agreed to the proposed timelines for implementation for each option and the concept of grandfathering in existing employees as of a certain date. Most of the ensuing discussion revolved around the RAP sheet and disposition of the fingerprint card. It was suggested that DPHHS would hold onto the RAP sheet until the appeal process timeline was over, and then destroy it. Looking into whether DPHHS or DOJ should destroy the fingerprint card. It is procedural, but important for legislature to know that fingerprint cards are destroyed. DPHHS only involved in the process after fingerprint is completed so fingerprint cards and issues regarding rejected cards would be dealt with between DOJ and employer.

#### **Public comment**

None.

#### **Process and Administrative Activities for a system of Background checks progress/methodology for estimating costs. (Continued).**

The workgroup continued discussion of the handouts. Some action items and details will be to talked about but this outline everyone felt was useful to get a feeling for the administrative requirements. Regarding the cost of the background check, it was suggested that if state is paying for it, the department should provide a thumbs up or thumbs down related to the disqualifying events. If employer pays for the cost of the background check then they should get a RAP sheet with a copy to DPHHS for purposes of the registry. All agreed that some type of notification to employer is needed, either electronic or paper, but most in workgroup liked an electronic option.

Length of time that the fingerprint background checks are good for was discussed. Several members thought that 5 years was too long but perhaps 3 years was more reasonable. The discussion included the possibility of another fingerprint check after 3 years. Jeff indicated that he thought about this and it is possible that something may be able to be done internally to update the background check by utilizing the department's access to Criminal Justice Information Network (CJIN). The department may be able to update the background check information if an individual is still employed in Montana and has not been absent for a specified period of time. If a person was residing in another state and returns to Montana a new fingerprint background check would be required. The discussion included methods to keep the information on the registry valid and current. It was suggested that the State may need to find a way to get individuals off the registry if they are inactive for a certain amount of years. One suggestion is to ask employers for their active employee roster every year or require employers to validate the employment on the registry somehow each year. These are details of the registry that the department would need to consider and perhaps continued involvement by the provider community and associations would be useful if some type of legislation was passed.

All agreed that there needs to be a training and education requirement for facilities and DPHHS staff under all three options and that the employer should have the ability to decide to hire the employee or not during the time it takes to complete the background check.

Regarding Option 3, although it may be the easiest to implement it does not seem necessary to have a registry with this option. Several members thought the cost may not be worth it for the benefit a registry may provide. Essentially the registry would primarily be a bad person list and require the reporting by employers and an administrative process to add someone to the list. A more formal correspondence with employee regarding appeal process would be needed.

## Summary and Review

Jeff identified a few items that still needed to be addressed and one is a cost analysis. The workgroup made it clear that they don't want to have applicants pay for the cost of the background checks, and to the extent possible the department needs to try and minimize the financial impact on employers. Jeff recognized this message and will try to address it in the report. Several work group members thought the money for the background checks need to be in the DPHHS budget. Jeff could not commit that it would be in the DPHHS budget request.

The other item on the "to do list" is to prepare the report for the legislature and provide an opportunity for the workgroup's review before finalizing the report. Jeff mention that the next meeting of the Children's Families Health and Human Services Committee is sometime in June and the report probably will not be done by then. Jeff would like to have one more meeting to discuss the report and go over the cost analysis. This meeting was suggested to be in June sometime. All agreed that they would like to have this opportunity.

The work group went around the table with the remaining members regarding their preference on the options we discussed in light of all the information that has been provided, and everything they have learned over the last several meetings. In summary, all of the workgroup members indicated they though a fingerprint background check process was the best option. Several quantified that response by indicating it depended on the cost, who pays, and how fast the background check can be completed.

Things that need to be considered:

- ✓ Some sort of phase in process, either by service setting type or geographical region.
- ✓ Enforcement of law.

Action items:

- ♦ Write the report. QAD will work with the Director and Governor. Will want one more meeting, in mid to late June.
- ♦ Look for funding and cost out each option.
- ♦ Work on appeal process and administrative documents.
- ♦ Break out the estimated number of people affected by DLI by service setting.

## Public Comment

James Driggers, SLTC. He is just interested in process. Compliment the group. Division needs a round of applause.

Seeing no further public comment Jeff adjourned the meeting.



Department of Public Health & Human Services  
Quality Assurance Division  
SJ 7 Workgroup - Meeting #4  
April 9th and 10th, 2008  
Colonial Building –Board of Investments Conference Room, Third Floor  
2401 Colonial Drive  
Helena, MT 59601

AMERICANS WITH DISABILITIES ACT:

The Department of Public Health and Human Services is committed to providing meeting access through reasonable accommodation under the Americans with Disabilities Act. Please contact the Quality Assurance Division office at 406-444-2099 prior to the proposed meeting date for further information.

Agenda

April 9, 2008

- 1:00 P.M. Welcome & Brief Summary of Last Meeting -- Review & Approve Minutes
- 1:15 P.M. DOJ information regarding fingerprints and availability of results (Joe Wodnik/David Blade)
- 2:45 P.M. Break
- 3:00 P.M. Discussion Disqualifying Events – (Becky Fleming-Siebenaler)
- 4:30 P.M. \* Public Comment
- 4:45 P.M. Summary and Adjourn

April 10, 2008

- 8:30 A.M. Discussion Appeals Process
- 10:00 A.M. Break
- 10:15 A.M. Review of options for Background Check Process
- 11:45 A.M. \* Public Comment
- 12:00 P.M. Break for lunch
- 12:30 P.M. Discussion – Process and Administrative Activities for a system of Background checks  
Progress / Methodology for estimating costs
- 2:30 P.M. \* Public Comment
- 2:45 P.M. Summary & Review
- 3:00 P.M. Adjourn

\* Public Comment- In accordance with 2-3-103(1) MCA, the Department will hold a public comment period. Please note that this is the public's opportunity to address the work group on SJ 7.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Findings.** The people of the state of Montana find that:

(1) Montana persons with disabilities and persons who are elderly deserve to have home and community-care options allowing them to live independently if they choose, and those options are less costly than institutional care;

(2) hundreds of Montana persons with disabilities and persons who are elderly are currently on waiting lists for home and community-based services that would allow them to stay in their homes and the community rather than in long-term care facilities;

(3) quality long-term care community services that are widely available allow Montana persons with disabilities and persons who are elderly and their families to make the choice to remain in their homes;

(4) providing multiple service options in a cost-effective and streamlined manner would benefit Montana persons with disabilities and persons who are elderly;

(5) the quality of long-term in-home care services in Montana would benefit from improved regulation, higher standards, better accountability, and improved access to those services;

(6) the quality of long-term in-home care services in Montana would further be improved by a well-trained, stable individual provider workforce earning reasonable wages and benefits;



(7) it is of utmost importance to prevent fraud and abuse against Montana persons with disabilities and persons who are elderly. Fraud and abuse can be prevented by setting training standards and conducting criminal background checks for the individual provider workforce.

NEW SECTION. **Section 2. Individual provider program.** (1) As part of home and community-based services, the department shall establish and maintain an individual provider program to provide personal assistance, home care, respite, and other similar residential services to consumers as an alternative to agency-based care under the following conditions:

(a) a consumer shall have the right to choose, hire, schedule, supervise and fire an individual provider;

(b) the terms of hiring for an individual provider must be consistent with any collective bargaining agreement under [section 8 ];

(c) the individual provider shall be paid directly through a personal contract with the department; and

(d) medicaid reimbursement must be the source of funds for payment for individual provider services.

(2) The program must initially provide services to unserved and underserved consumers, including those consumers currently on waiting lists for medicaid home and community-based services.

(3) The department shall certify individual providers and establish and maintain a registry of certified individual providers to assist consumers and prospective consumers in finding individual providers.

**NEW SECTION. Section 3. Rulemaking -- certification, training, and criminal background checks for individual providers.**

(1) The department shall adopt rules necessary to implement [sections 1 through 6], including program administration, certification, and training.

(2) The rules may address any need of the program but must, at a minimum:

(a) establish requirements for certification of individual providers, including education, training, and the absence of a history of personal activity involving fraud, theft, or abuse;

(b) establish criminal background and general background check requirements necessary for certification of individual providers;

(c) establish continuing education, training, and background check requirements for renewal certification of individual providers; and

(d) establish standards for contracting between the department and individual providers.

**NEW SECTION. Section 4. Long-term care assessment and counseling program.** The department shall, in addition to any level-of-care determination:

(1) develop a long-term care assessment and counseling program available to all Montanans to help with current and future care needs for consumers and their families and make the program available to all Montanans using appropriate technology to assist with understanding long-term care costs and service options, including services that can be received at home;

(2) develop and implement an information, assessment, and counseling program for individuals who have been recently admitted to a nursing facility or other long-term care facility;

(3) develop a single standardized assessment tool for all medicaid long-term care applicants that determines financial eligibility, hours of care, level of care, health care needs, and living arrangements;

(4) require use of the assessment tool described in subsection (3) to assign a plan of care that fully addresses the needs of the consumer and accurately assigns hours of care to meet those needs;

(5) discuss all appropriate care options, including any options for public support, with consumers and their families within 7 days after admission to a long-term care facility; and

(6) help consumers, their families, and designated representatives plan for, locate, and secure services available at home and outside the nursing facility.

NEW SECTION. **Section 5. Elimination of waiting lists.** 1) The department shall by January 1, 2010, respond to and, to the extent

funding is available, use direct care workers and other services to eliminate waiting lists for medicaid-funded services delivered to consumers living at home.

(2) If, by January 1, 2010, there are still consumers on waiting lists, the department shall by July 1, 2010 prepare and submit a report to the governor and the legislature detailing a plan to reduce or eliminate the waiting list, including the number of consumers and funding needed.

NEW SECTION. **Section 6. Presumptive medicaid eligibility.**

(1) The department, in order to provide for continuous coverage for consumers, shall establish a medicaid-funded presumptive eligibility program that:

(a) presumes medicaid eligibility for those consumers who meet the requirements of a presumptive period; and

(b) assists a consumer so that they may access medicaid-funded home care during the presumptive period.

(2) The presumption established in subsection 1 ends when a consumer is found to be ineligible for medicaid funding.

(3) The department may recover any costs incurred by the department for providing services to a consumer during the presumptive period, including seeking payment from any consumer who is found to be ineligible for Medicaid funded services.

NEW SECTION. **Section 7. Collective bargaining in individual provider program -- consumer rights.** (1) The individual provider program established in [section 2], must not limit the right of a consumer or prospective consumer to choose, hire, schedule work hours, allocate service hours among providers, supervise the work of or fire any individual provider providing services to them.

(2) The department of public health and human services may not increase or reduce the hours of service determined to be necessary for any consumer through an assessment under [section 4] because those hours of service are provided by an individual provider.

(3) A consumer may choose to receive long term in-home care services from an individual provider who is not referred by the department.

(4) The department of public health and human services shall solicit input from the Montana statewide independent living council and the governor's advisory council on aging in establishing the individual provider program and prior to each negotiating session with any collective bargaining representative for the individual providers.

NEW SECTION. **Section 8. Collective bargaining for individual providers.** (1) Individual providers are public employees solely for the purpose of collective bargaining under this section and are not employees of the state or its political subdivisions for any other purpose.

(2) The wages, hours, working conditions, training, workforce sustainability and other benefits of individual providers are determined solely through collective bargaining. No state agency or department may establish policies or rules governing the wages or hours of individual providers. However, collective bargaining under this subsection must not limit:

(a) an individual consumer's plan of care;

(b) consumer rights established by [section 7];

(c) the authority of the department of public health and human services to determine the level of long-term care each consumer is eligible to receive;

(d) the authority of the department of public health and human services to terminate or deny a contract with an individual provider who is not certified under [section 2] or has been fired by the consumer;

(e) the ability of the department of public health and human services to comply with the federal medicaid statutes and regulations and the terms of any community-based waiver granted by the federal department of health and human services, or to ensure federal financial participation in the provision of the services;

(f) the legislature's right to make programmatic modifications to the delivery and nature of state services provided, including standards of eligibility of consumers and individual providers participating in individual provider programs.



(3) The chief executive officer of the state or the designated authorized representative, when requested by the exclusive bargaining representative, shall engage in collective bargaining over how the department's exercise of its authority under subsections 2(c), (d) and (e) affects the collective hours of work available for all individual providers.

(4) The department of public health and human services has the responsibility to withhold unemployment insurance, taxes, and other legally required or agreed to payroll deductions from payments made to individual providers. However, individual providers are not considered employees of the state as a result of the state assuming this responsibility.

**NEW SECTION. Section 9. Strikes by individual providers**

**prohibited.** (1) It is unlawful for an individual provider as defined in 39-31-103 to strike or recognize a picket line of a labor organization while under the terms of any collective bargaining agreement negotiated under [section 8] or during negotiation or arbitration of any successor agreement.

(2) (a) As used in this section "strike" means an action listed in subsection (2)(b), in concerted action with others, for the purpose of inducing, influencing, or coercing a change in the conditions of employment, compensation, rights, privileges, or obligations of employment of an individual provider.

(b) An individual provider may not engage in the following actions in concert with others:

- (i) refusal to report for work;
- (ii) willful absence from work;
- (iii) stoppage of work; or
- (iv) departure from the full, faithful, or proper performance of duties of employment.

**NEW SECTION. Section 10. Arbitration for Individual**

**Providers.** (1) This section applies only to individual providers as defined in 39-31-103 and the chief executive officer of the state acting under 39-31-301.

(2) If an impasse is reached in the course of collective bargaining between the chief executive officer of the state and the exclusive bargaining representative for individual providers and if the procedures for mediation and factfinding in 39-31-307 through 39-31-310 have been exhausted, either party or both jointly may petition the board of appeals for final and binding arbitration.

(3) Within 3 days of the receipt of a petition for final and binding arbitration, the board of personnel appeals shall submit to the parties a list of five qualified and disinterested arbitrators. From the list submitted by the board, the parties shall alternately strike two names. The order of striking names must be determined by a coin toss. The remaining person shall be designated as the arbitrator. The parties

shall notify the board of the designated arbitrator within 5 days of the receipt of the list.

(4) If the parties have not designated the arbitrator and notified the board of personnel appeals of their choice within 5 days of receipt of the list, the board of personnel appeals shall appoint the arbitrator from the names on the list. However, if one of the parties strikes names from the list, as provided in subsection (3), the board shall appoint the arbitrator from the names remaining on the list.

(5) The arbitrator shall establish the dates, times, and places of hearings. The arbitrator may issue subpoenas. Within 14 calendar days prior to the date of a hearing, each party shall submit to the other party a written last best offer on all unresolved mandatory subjects. The last best offer may not be changed during arbitration. If the parties cannot agree on the issues to be determined by the arbitrator, the arbitrator will certify the issues to be determined from the parties' last best offers. The arbitrator may administer oaths and shall afford the parties the opportunity to examine and cross-examine all witnesses and to present evidence relevant to the dispute.

(6) The arbitrator shall decide the unresolved mandatory subjects contained in the last best offers. The arbitrator shall base findings and opinions on the following criteria, giving each criteria equal weight. The criteria are:

(a) the interest and welfare of the public;

(b) the reasonable financial ability of the state to meet the costs of the proposed contract, giving consideration and weight to other services provided by the state;

(c) the ability to attract and retain qualified personnel at the wage and benefit levels provided;

(d) the state's interest in promoting a stable long-term care workforce to provide quality and reliable care to vulnerable elderly and disabled recipients;

(e) the overall compensation presently received by the providers, including direct wage compensation and all other direct or indirect monetary benefits;

(f) comparison of the wages, hours, and conditions of employment of publicly reimbursed personnel providing similar services to similar clients, including clients who are elderly, frail, or have developmental disabilities, in comparable communities in Montana and other northwestern states;

(g) the state's interest in ensuring access to affordable, quality health care for all citizens of the state;

(h) the state's fiscal interest in reducing reliance upon public benefits programs, including but not limited to medical coupons, food stamps, subsidized housing, and emergency medical services;

(i) inflation as measured by the consumer price index, U.S. city average, commonly known as the cost of living;

(j) the stipulations of the parties; and

(k) other factors, consistent with subsections (6)(a) through (6)(j), that are traditionally taken into consideration in the determination of wages, hours, and other terms and conditions of employment. However, the arbitrator may not use other factors if, in the judgment of the arbitrator, the factors listed in subsections (6)(a) through (6)(j) provide a sufficient basis for an award.

(7) Within 30 days after the conclusion of the hearings or an additional period agreed upon by the parties, the arbitrator shall select from among the last best offers submitted by the parties or certified by the arbitrator and shall make written findings along with an opinion and order. The opinion and order must be served on the parties and the board of personnel appeals. Service may be made by personal delivery or by certified mail. The findings, opinion, and order must be based upon the criteria listed in subsection (6).

(8) Nothing prohibits the parties to the impasse from reaching an agreement prior to the rendering of a determination by the arbitrator.

(9) The cost of arbitration must be borne equally by the parties.

**Section 11.** Section 39-31-103, MCA, is amended to read:

**"39-31-103. Definitions.** When used in this chapter, the following definitions apply:

(1) "Appropriate unit" means a group of public employees banded together for collective bargaining purposes as designated by the board.

(2) "Board" means the board of personnel appeals provided for in 2-15-1705.

(3) "Consumer" has the meaning provided in 53-6-401.

(3) (4) "Confidential employee" means any person found by the board to be a confidential labor relations employee and any person employed in the personnel division, department of administration, who acts with discretionary authority in the creation or revision of state classification specifications.

(4) (5) "Exclusive representative" means the labor organization which has been designated by the board as the exclusive representative of employees in an appropriate unit or has been so recognized by the public employer.

(6) "Individual provider" has the meaning provided in 53- 6-401.

(5)(7) "Labor dispute" includes any controversy concerning terms, tenure, or conditions of employment or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(6)(8) "Labor organization" means any organization or association of any kind in which employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes,



wages, rates of pay, hours of employment, fringe benefits, or other conditions of employment.

~~(7)~~(9) "Management official" means a representative of management having authority to act for the agency on any matters relating to the implementation of agency policy.

~~(8)~~(10) "Person" includes one or more individuals, labor organizations, public employees, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

~~(9)~~(11) (a) "Public employee" means:

(i) except as provided in subsection ~~(10)~~(b), a person employed by a public employer in any capacity; and

(ii) an individual whose work has ceased as a consequence of or in connection with any unfair labor practice or concerted employee action.

(b) Public employee does not mean:

(i) an elected official;

(ii) a person directly appointed by the governor;

(iii) a supervisory employee, as defined in subsection ~~(12)~~;

(iv) a management official, as defined in subsection ~~(7)~~;

(v) a confidential employee, as defined in subsection ~~(3)~~;

(vi) a member of any state board or commission who serves the state intermittently;

(vii) a school district clerk;

(viii) a school administrator;

(ix) a registered professional nurse performing service for a health care facility;

(x) a professional engineer; or

(xi) an engineer intern.

~~(10)~~(12) "Public employer" means the state of Montana or any political subdivision thereof, including but not limited to any town, city, county, district, school board, board of regents, public and quasi-public corporation, housing authority or other authority established by law, and any representative or agent designated by the public employer to act in its interest in dealing with public employees. Public employer also includes any local public agency designated as a head start agency as provided in 42 U.S.C. 9836.

~~(11)~~(13) (a) "Supervisory employee" means an individual having the authority on a regular, recurring basis while acting in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees or to effectively recommend the above actions if, in connection with the foregoing, the exercise of the authority is not of a merely routine or clerical nature but requires the use of independent judgment.

(b) The authority described in subsection (12)(a) is the only criteria that may be used to determine if an employee is a supervisory employee. The use of any other criteria, including any secondary test developed or applied by the national labor relations board or the Montana board of

personnel appeals, may not be used to determine if an employee is a supervisory employee under this section.

(12)(14) "Unfair labor practice" means any unfair labor practice listed in 39-31-401 or 39-31-402."

**Section 12.** Section 39-31-202, MCA, is amended to read:

**"39-31-202. Board to determine appropriate bargaining unit -- factors to be considered -- exception.** (1)(a) Except as provided in subsection (1)(b), in order to ensure employees the fullest freedom in exercising the rights guaranteed by this chapter, the board or an agent of the board shall decide the unit appropriate for the purpose of collective bargaining and shall consider such factors as community of interest, wages, hours, fringe benefits, and other working conditions of the employees involved, the history of collective bargaining, common supervision, common personnel policies, extent of integration of work functions and interchange among employees affected, and the desires of the employees.

(b) In the case of individual providers, the only unit appropriate for the purpose of collective bargaining is a statewide unit comprised only of individual providers.

(2) If a state agency or facility of a state agency is reorganized to the extent that the reorganization results in substantial changes to the factors listed in subsection (1), the public employer representative, as provided in 39-31-301, may petition the board to make a new

determination of the appropriate unit for the purpose of collective bargaining. In making this determination, the board shall take into account the consequences of the reorganization on each position in the affected agency or facility.

(3) Unless the board has received a petition, as provided in 39-31-207, to consider a collective bargaining unit that was not designated as an appropriate unit prior to the reorganization described in subsection (2), the board may not consider any labor organization that was not designated to represent employees of the affected agency or facility at the time that the reorganization became effective."

**Section 13.** Section 39-31-301, MCA, is amended to read:

**"39-31-301. Representative of public employer.** (1) The chief executive officer of the state, the governing body of a political subdivision, the commissioner of higher education, whether elected or appointed, or the designated authorized representative shall represent the public employer in collective bargaining with an exclusive representative.

(2) In all collective bargaining matters involving individual providers, the chief executive officer of the state or the designated authorized representative serves as the public employer representative."

**Section 14.** Section 39-31-305, MCA, is amended to read:

**"39-31-305. Duty to bargain collectively -- good faith.** (1) The public employer and the exclusive representative, through appropriate

(1) "Consumer" means a person with disabilities or a person who is elderly and who is eligible for services under 53-6-131 or who may be in need of basic or ancillary services as provided in 53-6-402.

(1)(2) "Department" means the department of public health and human services provided for in 2-15-2201.

(3) "Direct-care worker" means a person who is a paid caregiver who provides home and community-based services directly to a consumer.

(2)(4) "Home and community-based services" means, as provided for in section 1915 of Title XIX of the Social Security Act, 42 U.S.C. 1396n(c), and any regulations implementing that statute, long-term medical, habilitative, rehabilitative, and other services provided in personal residences or in community settings and funded by the department with medicaid money.

(5) "Individual provider" means a direct-care worker certified by the department for employment directly by the consumer with payment for the provider services made through medicaid reimbursement under contract with the department.

(3)(6) "Level-of-care determination" means an assessment of a person and the resulting determination establishing whether long-term care facility services to be provided to the person are appropriate to meet the health care and related circumstances and needs of the person.

~~(4)~~(7) "Long-term care facility" means a facility that is certified by the department, as provided in 53-6-106, to provide skilled or intermediate nursing care services, including intermediate nursing care services for persons with developmental disabilities or, for the purposes of implementation of medicaid-funded programs of home and community-based services, that is recognized by the U.S. department of health and human services to be an institutional setting from which persons may be diverted through the receipt of home and community-based services.

~~(5)~~(8) "Long-term care preadmission screening" means, in accordance with section 1919 of Title XIX of the Social Security Act, 42 U.S.C. 1396r, a process conducted according to a specific set of criteria for determining whether a person with mental retardation or mental illness may be admitted to a long-term care facility.

~~(6)~~(9) "Persons with disabilities or persons who are elderly" means, for purposes of establishing home and community-based services, those categories of persons who are elderly and disabled as defined in accordance with section 1915 of Title XIX of the Social Security Act, 42 U.S.C. 1396n.

(10) "Presumptive period" means a period of time no greater than 60 days following the discharge of a consumer from a health care facility as defined in 53-6-106, during which time the consumer has informed the department of their expected medicaid eligibility and has sought



medicaid payment approval for in-home and community based services, including those provided during the presumptive period. "

(1) Program" means the individual provider program as provided in [section 2]."

**NEW SECTION. Section 16. Codification instruction.** (1)

Sections 1 through 6 are intended to be codified as an integral part of Title 53, chapter 6, part 4, and the provisions of Title 53, chapter 6, part 4, apply to sections 1 through 6.

(2) Sections 7 and 8 are intended to be codified as an integral part of Title 39, chapter 31, and the provisions of Title 39, chapter 31, apply to sections 7 and 8.

(3) Sections 9 and 10 are intended to be codified as Title 39, chapter 35.

**NEW SECTION. Section 17. Severability.** If a part of this act is invalid, all valid parts that are severable from the invalid part remain in effect. If a part of this act is invalid in one or more of its applications, the part remains in effect in all valid applications that are severable from the invalid applications.

**NEW SECTION. Section 18. Effective date.** This act is effective upon approval by the electorate.

**NEW SECTION. Section 19. Submission to electorate.** This act shall be submitted to the qualified electors of Montana at the general

election to be held in November 2008 by printing on the ballot the following statements of purpose and implication:

Statement of Purpose (100 words)

This initiative directs the state to create an individual provider program to provide in-home personal assistance to low-income elderly and disabled persons who need help with daily living. It directs the development of a long-term care assessment and counseling program and standards for individual provider certification including background checks and training. The state is encouraged to eliminate waiting lists for in-home care services and where possible, to provide for up to 60 days of presumptive eligibility for home care services for persons discharged from a hospital. Individual provider workers could collectively bargain with the Governor.

Statements of Implication (25 words)

[] FOR creating an individual provider program to provide in-home care services to the disabled and elderly, with provider background checks, training, certification, and collective bargaining.

[] AGAINST creating an individual provider program to provide in-home care services to the disabled and elderly, with provider background checks, training, certification, and collective bargaining.

SJ 7 Workgroup  
Consensus on definitions – February 2008 Meeting

Definitions

*Pursuant to Senate Joint Resolution 7 from the 60<sup>th</sup> Session of the Montana Legislature, a contingent of interested Montanans and employees from the Department of Public Health and Human Services (DPHHS) and the Department of Justice (DOJ) formed a workgroup<sup>1</sup> to address the issue of performing criminal background checks on those individuals who work with vulnerable populations in facilities regulated by DPHHS. From the start, the group determined that criminal background checks are one critical aspect in protecting the health and safety of Montana's most vulnerable populations. Because a study of this magnitude is so complex and involves so many different types of health care workers and health care facilities, the group believed one of its primary charges was to define "direct care worker." The group carefully considered the potential impact that criminal background check requirements would have on facilities, workers and beneficiaries. Striving to meet the charge of the Legislature, considering the needs of employers and regulators and seeking the best path to promote public safety, the group offers the following definitions.*

The definition for the "Direct Care Worker" was changed to "Direct Care Access Employee" for the purposes of this project so that the employees covered under this requirement would not be confused with the employees covered under the reimbursement and funding provisions of DPHHS related to increased wages for direct care workers.

*Direct care access employee* means a person, 18 years of age and older, who has employment or contractual relationship with a service setting that is funded or regulated by the Department and involves direct contact with a vulnerable person. Such term does not include an individual that is employed or providing services through a private arrangement with a vulnerable person or their designated representative.

*Vulnerable person* means a person who receives services as defined in this act and who needs to be protected from abuse, neglect or exploitation.

*Direct contact* means physical access to persons receiving services or that person's personal property.

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<sup>1</sup> DPHHS Director Joan Miles formed the SJ 7 workgroup consisting of 15 members that include representatives from provider associations, provider community, consumers, citizens' advocacy groups and area business group representatives. Members of the workgroup and members of the public recognized the reason for this resolution, and the current trend to protect society's vulnerable population in government sponsored or supported programs and services. The guiding principle of this work group was to protect the overall safety of the state's most vulnerable residents.

*Service setting* for the purposes of this act means those programs or services that the legislature has determined to represent the greatest risk to the health, safety, and welfare of vulnerable persons served by the department. Such definition include, as these services are defined in statute and Administrative Rule:

- Youth Care Facilities
- Community home for persons with severe disabilities - Group Homes for Developmentally Disabled or Physically Disabled
- Adult Day Care
- Adult Foster Care
- Assisted Living Facilities
- Critical Access Hospitals
- Home Health agency
- Hospice
- Hospitals (Including inpatient psychiatric services) Montana State Hospital
- Inpatient Chemical Dependency Centers
- Intermediate Care Facility for the Developmentally Disabled
- Mental Health Centers
- Nursing Facility (Nursing Homes) (LTC) (Veteran's Homes) (Montana Developmental Center) (Montana Mental Health Nursing Care Center) (Transitional Care Unit)
- Residential Treatment Center (RTC)
- Home and Community Based Services (HCBS)<sup>2</sup> *as identified by administrative rule.*
- Personal Care Services

#### Home and Community Based Services (HCBS) under the Service Settings

Under the service setting definition each HCBS program is required to identify the HCBS services provided by the department and specifically identify those services that require criminal background checks for direct care access employees. *Due to the broad nature of the HCBS services and the fact that some services are provided by contractors for home or vehicle modifications and other services are provided by licensed healthcare professionals, not all of the HCBS services would necessarily require criminal background checks.*

#### Self-Direct model services

Self-direct model services are included in the service settings. *In circumstances where services are provided under the self-direct model, criminal background checks are required. The provision of services under the self-direct model, where the person receiving services or a personal representative acts as the employer of the direct care access employee in making the decisions of who to employ, terms of employment, length of employment, and other matters, are included in the background check criteria.*

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<sup>2</sup> Section 1915 of Title XIX of the Social Security Act, 42 U.S.C. 1396n, provides authority for States to administer programs of home and community-based services funded with Medicaid money for categories of persons with disabilities or persons who are elderly.

Department of Justice  
Division of Criminal Investigation / Investigation Support Bureau  
Criminal Records & Identification Services Section  
SJ7 Working Group Meeting #4 - April 9<sup>th</sup> & 10<sup>th</sup>, 2008

**SJ7 WG Questions regarding background checks:**

**1. How does the fingerprint based background check process work?**

One set of rolled fingerprints are submitted on a blue Applicant fingerprint card (Form FD-258). Completed and signed fingerprint cards are mailed or delivered by the qualified entity to the DOJ Criminal Records & Identification Services Section in Helena. Fingerprint cards may not be submitted by individuals. Receipt for payment is prepared, or the appropriate agency is billed (payment due monthly).

A quality control analysis is conducted on the fingerprint card to verify that all required demographic information is included and that the rolled fingerprint impressions are of a sufficient quality for processing. Cards rejected at this point are mailed back to the qualified entity with an explanation of the reason rejected. A new set of prints may be submitted along with a copy of the rejected prints at no additional charge.

The fingerprint card is processed by DOJ through the Western Identification Network (WIN) (\*see Note 1) and the Federal Bureau of Investigation (FBI). Once the fingerprints are processed, the results are printed and attached to the fingerprint card for return to the qualified entity. The results will consist of one of the following:

1. Notification that the individual does not have a criminal history record.
2. A copy of the individual's complete criminal history record (rap sheet).
3. Notification that the fingerprints were rejected due to poor print quality. A new set of prints may be submitted along with a copy of the FBI reject notification at no additional charge. Once the FBI has rejected the individual's prints twice, a name based national check may be run by the FBI at no additional charge.

(\*Note 1) WIN is a consortium of state and local law enforcement agencies that have implemented a shared network and Automated Fingerprint Identification System (AFIS) processing service to provide the ability to search the criminal fingerprint records of the member agencies. WIN members include Alaska, Idaho, Montana, Nevada, Oregon, Utah, Washington and Wyoming.

**2. What are the costs involved?**

Blank fingerprint card forms:	No cost
Fingerprint training by DOJ:	No cost
Fingerprints rolled by DOJ/CRISS:	\$5.00
Fingerprints rolled by other agencies:	\$5.00 - \$40.00
Name based MT public background check:	\$10.00
Name based MT public background check via Internet:	\$11.50
Fingerprint based MT/WIN background check:	\$10.00
Fingerprint based National background check:	\$29.95 (Employees)
	\$25.25 (Volunteers)



### **3. What is public information and can be released?**

A public criminal history record is available to anyone for a fee and contains the complete criminal record except for personal descriptors and dismissals after a deferred imposition of sentence.

A confidential record is available only to criminal justice agencies, to those authorized by law to receive it, by court order and to the individual of record. Confidential criminal history information includes all physical identifiers and dismissals after a deferred imposition of sentence.

Results of a fingerprint based background check done under the authority of Public Law 92-544 (see Note 2) will include the individual's full criminal history record (rap sheet). Results may be shared with other qualified entities if a user agreement is in place and a consent form has been obtained (see attached FBI letter dated November 2, 2006).

#### **(\*Note 2) Public Law (PL) 92-544 Requirements**

The authority for the FBI to conduct a criminal record check for a non-criminal justice licensing or employment purpose is based upon PL 92-544. Pursuant to PL 92-544, the FBI is empowered to exchange identification records with officials or state and local governments for purposes of licensing and employment if authorized by a state statute which has been approved by the Attorney General of the United States. The Attorney General's authority to approve the statute is delegated to the FBI which uses standards established by a series of memoranda issued by the Office of Legal Counsel, US DOJ. The standards are:

1. The authorization must exist as the result of legislative enactment (or its functional equivalent);
2. The authorization must require fingerprinting of the applicant;
3. The authorization must, expressly or by implication, authorize use of FBI records for screening of the applicant;
4. The authorization must not be against public policy;
5. The authorization must not be overly broad in its scope; it must identify the specific category of applicant/licensees.

### **4. How long does a FBI fingerprint check take?**

Current processing time usually takes 5 - 10 working days. This does not include mailing time or time (up to three working days) needed while DOJ attempts to obtain arrest disposition information that may be missing from the criminal history record.

### **5. What is the difference between a name-based search and a fingerprint-based search?**

Name-based searches look for criminal history records that match a person's name and numeric identifier, such as date of birth and/or Social Security number. Name-based searches have two inherent weaknesses:



- False-positives - a record is returned on a person with the same name and numeric identifier provided in the request but who is not the subject of the inquiry.
- False-negatives - no match is erroneously returned because the name or numeric identifier in the record does not match the name or numeric identifier used in the inquiry.

Fingerprint based checks provides a positive biometric identification of the person regardless of the name or numerical identifiers utilized.

#### **5. How can criminal history record background check results be challenged?**

If a person challenges a denial of an opportunity to volunteer or be employed by the authorized entity on the basis of a criminal history background check result, the person can be provided a copy of the criminal history record after verifying their identity. If a person believes their criminal history record is in error, they must contact DOJ for assistance in correcting the error. Procedures for challenging and correcting criminal record information are contained in MCA 44-5-215. There is a \$10.00 charge if fingerprint verification required for a Montana record; \$18.00 if for a FBI record.

#### **6. How frequently should new background checks be done?**

There are currently no set requirements regarding frequency of follow-up background checks. The criminal history repository is a dynamic file with new arrests added daily. Each qualified entity will have to determine how frequently their employees and volunteers need to be re-checked. Considerations for setting a frequency might also include employee turnover rate as well as the cost involved.

#### **7. What are the audit requirements for DPHHS and Providers?**

The compliance audit program is still under development, but the intent is to initially conduct an on-site audit/training visit of all qualified agencies/entities. After the initial audit a periodic sample of entities will be audited. This audit could consist of an on-site audit, a mail-in questionnaire, a phone interview or a combination of these methods. Audits will not routinely be conducted more frequently than once every three years. If questions arise regarding the confidentiality or security of information from a specific qualified entity, DOJ may conduct an audit of the entity to ensure that all provisions in the user agreement are being enforced. Authorized agencies may also be required to participate in FBI audits of the state of Montana. The FBI audits of Montana take place once every three years.

**Pros vs. Cons for each of the three background check disqualifying event options:**

**Option #1**

**Full Fingerprint Background Check**

**Pros:**

- Most reliable results through positive ID of the applicant
- Only method available to obtain national check

**Cons:**

- Associated costs
- Processing time
- Process for obtaining fingerprints (such as, who will print the applicants?)
- Fiscal impact to DOJ for increased work load
- Requires statute to meet PL 92-544 requirements

**Option #2**

**Criminal Background Check Required & the State Prescribes a Process of a Progressive Check**

**Pros:**

- Associated costs are initially less if starting with a name based check
- Turn around time for name based results may be faster than fingerprint check

**Cons:**

- Increased chance of false or missed matches if name based
- Applicant may not provide accurate information negating the results of a name based check
- May actually take more of the Provider's time and resources in managing and verifying the information provided by the applicant.
- Requires statute to meet PL 92-544 requirements if fingerprint based

**Option #3**

Some type of Criminal Background Check Required. Employer has policies and procedures to determine their process. DPHHS will explain possibilities but the employer will decide.

**Pros:**

- Will allow the Provider to choose how thorough of a check they want to conduct on applicants
- Could reduce the amount of time to get information back
- Allows Providers to control costs

**Cons:**

- Background checks may not provide complete information on applicants
- There may be an inconsistency on background checks from Provider to Provider dependant on how and by whom the checks are conducted
- Least dependable of the three options to provide accurate information regarding criminal history
- Requires statute to meet PL 92-544 requirements if fingerprint based



U.S. Department of Justice

Federal Bureau of Investigation

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Criminal Justice Information  
Services Division  
Clarksburg, WV 26306  
November 2, 2006

TO: ALL CJIS SYSTEMS OFFICERS AND STATE IDENTIFICATION BUREAU  
REPRESENTATIVES

The purpose of this letter is to advise that the dissemination of an individual's criminal history record information (CHRI) to a nongovernmental entity (NGE) with the individual's consent and at his direction is not legally objectionable under Federal law.

The safety and well-being of children and other vulnerable individuals is a national priority. The National Child Protection Act (NCPA), as amended by the Volunteers for Children Act (VCA), encouraged states to authorize fingerprint-based national criminal history record information (CHRI) background checks of individuals having access to children and other vulnerable people, by enacting legislation under Public Law (Pub. L.) 92-544.<sup>1</sup> The NCPA/VCA also authorized entities in states without specific Pub. L. 92-544 legislation to obtain national CHRI background checks.<sup>2</sup> Recommended policies and procedures for implementation of the NCPA/VCA were previously set out by the FBI in the Criminal Justice Information Services (CJIS) Information Letter 99-3.<sup>3</sup>

The success of this national initiative of child protection is dependent on the cooperation by the states in the implementation of the NCPA/VCA and other federal and state legislation.<sup>4</sup> Many states have established programs for conducting criminal history record background checks on individuals who work with children, the elderly, or the disabled. A successful example is the Volunteer & Employee Criminal History System (VECHS) program developed by the Florida Department of Law Enforcement (FDLE) using the basic framework of NCPA/VCA with the added feature of dissemination of an individual's CHRI to NGEs at his request. By establishing strict controls on the access and use of CHRI by entities enrolled in the VECHS program, the FDLE has created a program that facilitates the performance of criminal history record checks on thousands of individuals who work with children, the elderly, or individuals with disabilities.

As a result of the success of the VECHS program, the National Crime Prevention and Privacy Compact Council requested the FBI to provide advice on the dissemination under the NCPA/VCA of an individual's CHRI to an NGE with the individual's consent. The FBI has no legal objection to the dissemination of CHRI at the consent of the individual, as the practice does not conflict with Federal law.<sup>5</sup> Other states planning to establish CHRI background check programs, that include the dissemination of CHRI to NGEs, must incorporate the following provisions. Since state laws vary widely, all agencies are advised to review any proposed programs with legal counsel.

ALL CJIS SYSTEM OFFICERS AND STATE IDENTIFICATION BUREAU  
REPRESENTATIVES

The state shall establish procedures for program participation by NGEs which serve children, the elderly, or disabled persons. The NGEs must execute a user agreement that sets out the terms under which the criminal history record checks may be performed, including the security requirements for protection of the CHRI and the procedures for challenging the accuracy and completeness of the CHRI as entitled by the NCPA/VCA and 28 Code of Federal Regulation 50.12.<sup>6</sup>

The NGE shall obtain an executed consent form (waiver) from every employee or volunteer subjected to the criminal history record check. The NGE shall retain the original waiver and transmit a copy to the state. The terms of the waiver must include an acknowledgment that the NGE will perform an FBI criminal history records check and that the state is specifically authorized to disseminate the resulting CHRI, if any, to the NGE.<sup>7</sup> The waiver may further authorize the NGE to provide the CHRI to another NGE. The NGE must maintain a record of any secondary dissemination of the CHRI.

For more information about the VECHS program, please contact the FDLE's User Services Bureau, VECHS Unit, at (850) 410-VECHS (8324) or log on the FDLE's website at [www.FDLE.state.fl.us/BackgroundChecks](http://www.FDLE.state.fl.us/BackgroundChecks). For more information about the NCPA/VCA, please contact Mr. Allen Wayne Nash, FBI, CJIS Division's Criminal Information & Transition Unit, at (304) 625-2738.

Sincerely yours,

David Cuthbertson  
Section Chief

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<sup>1</sup> See 42 U.S.C. § 5119a. The CHRI background checks under the NCPA/VCA determine whether the individual has been convicted of crimes that bear upon his fitness to have responsibility for the safety and well-being of children, the elderly or individuals with disabilities.

<sup>2</sup> 42 U.S.C. § 5119a(a)(1).

<sup>3</sup> Contact the CJIS Divisions' Communications Unit at (304) 625-4995 for a copy of the CJIS Information Letter 99-3 (12/01/1999).

<sup>4</sup> See e.g. The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Today (PROTECT) Act of 2003 (42 U.S.C. § 5119a note), as amended, and The Adam Walsh Child Protection and Safety Act of 2006 (Pub. L. 109-248).

<sup>5</sup> Access to CHRI by the subject of the record, or by an authorized representative with the consent of the subject, cannot be withheld under the Freedom of Information Act. See Title 5, U.S.C. § 552a(d)(1) and (t)(1).

<sup>6</sup> An example of a legally sufficient UA under Florida law may be obtained from FDLE.

<sup>7</sup> An example of a legally sufficient waiver under Florida law may be obtained from FDLE.

# ATTORNEY GENERAL

STATE OF MONTANA

Mike McGrath  
Attorney General



Department of Justice  
215 North Sanders  
PO Box 201401  
Helena, MT 59620-1401

## MEMORANDUM

TO: Ali Bovington  
FROM: Stuart Segrest  
DATE: April 7, 2008  
SUBJECT: Dissemination Limits of Criminal History Information  
under NCPA/VCA

**Issue I:** Under the NCPA/VCA (the Act), may DPHHS or another governmental entity receive the criminal history record information?

Short answer: Yes.

### Discussion:

Montana may designate DPHHS or another agency as the "authorized agency" under the Act. 42 U.S.C. § 5119c(1). The authorized agency "shall access and review" criminal history records through the national criminal history background check system. Montana may designate more than one agency as the authorized agency. 42 U.S.C. § 5119a(a)(2).

Even if DPHHS is not the designated authorized agency, the national criminal history may be shared w/ DPHHS via the "related agency" doctrine, which allows the exchange of the criminal record with other governmental agencies. 28 U.S.C. § 534(b). (See CJIS Information Letter 99-3 at 10.)

**Issue II:** Under the NCPA/VCA (the Act), may a nongovernmental qualified entity (the employer) receive the criminal history record information?

Short answer: Yes, with the individual's *consent*.

### Discussion:

The Criminal Justice Information Services Division of the FBI (CJIS) sent out an information letter dated November 2, 2006 advising that the dissemination of an individual's criminal history to an employer "with the individual's consent and at his discretion is not legally objectionable under Federal law." The letter first states that the criminal background check may be authorized via state statute under Pub. L. 92-544, or via employer request. 42 U.S.C. § 5119a. An example is then given from Florida, where an individual's criminal history is disseminated to employer's at the individual's request.

The FBI has "no legal objection to the dissemination" of an individual's criminal history "at the consent of the individual, as the practice does not conflict with Federal law." Letter at 1. The letter cites, for this

determination, to the fact that access to the criminal history cannot be withheld to the subject of the record, or "an authorized representative with the consent of the subject" under FOIA. (See the letter at fn. 5, citing Title 5, U.S.C. § 552a(d)(1) and (t)(1)).

The letter then lists certain "provisions" that states planning to disseminate criminal records to employers must incorporate. Letter at 1-2. Basically:

1. Employers must serve children, the elderly, or disabled persons.
2. They must execute a "user agreement" that sets out how the criminal background checks will be preformed, including "security requirements."
3. The employer must obtain a waiver from the employee or volunteer subjected to the background check.
4. The waiver must include an "acknowledgment that [the employer] will perform an FBI criminal history records check and that the state is specifically authorized to disseminate the resulting [record], if any, to the [employer]."

Conclusion:

Under the Act, an employer may receive the criminal history record information of an individual if the individual provides consent via a waiver.

DISQUALIFYING EVENTS SUMMARY (Draft #3)  
SJ7 Workgroup  
April 2008

During the February 2008 meeting the department presented a summary/recommendation document identifying and defining the crimes which would constitute disqualifying events for Montana. This document was the result of the workgroup activities from the December 2007 meeting and a subcommittee which met in January 2008.

During the February 2008 SJ7 workgroup meeting, several members voiced concern over the number of permanently identified disqualifying crimes and requested that the department again review the information; and in doing so, specifically requested that the department obtain assistance from the Department's legal staff, Department of Justice and others who have knowledge in this area of criminology.

As requested, department staff convened a second subcommittee which comprised of representatives from Department of Justice, Adult Protective Services and QAD staff members. Prior to the subcommittee meeting, DPHHS legal staff reviewed the list of crimes and identified the extent of penalty for those crimes—whether the crime could be charged as a Felony or Misdemeanor. Additionally, department legal staff researched other statutes which might contain crimes pertinent to the work of the SJ7 workgroup.

With this preparation complete, the second subcommittee began work and discussion on March 11, 2008. The subcommittee focused its attention in three distinct areas:

- (1) Crimes which could be considered Permanent Disqualifiers;
- (2) Crimes which could be 'aged out' with either a 5 or 10 year time frame; and
- (3) Identification of crimes which should not be considered.

Additionally, the subcommittee decided that that in order to make this a tenable task, the focus should be limited to crimes which have been designated as *felonies*. Misdemeanor crimes would not be considered at this time. \* In Montana, a crime is considered a felony if the sentence imposed upon conviction is imprisonment in a state prison for a term exceeding one year or if the sentence results in death.

The subcommittee--using only those crimes designated as felonies--has made recommendations as to which crimes should be considered permanent disqualifiers as well as those crimes which should be considered 'aged out offenses' with time frames of disqualification existing for 5 or 10 year periods. The attached document shows those recommendations.

The subcommittee also considered the discussions from the workgroup surrounding the authority to enforce the identified disqualifiers—should they be listed in statute, or in administrative rule? Consistent with the discussions of the SJ7 Workgroup, the subcommittee concurred and further recommends that all crimes designated as permanent disqualifiers be listed in statute, while the crimes designated as 'aged out' should be set in administrative rule.



SJ7 - Disqualifying Events  
Criminal Background Checks  
Updated: 4/4/2008

Prepared for the SJ7 Workgroup Meeting April 2008  
Recommendations of DPHHS and DOJ staff

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
<b>Chap 5 -- Offenses Against a Person</b>				
<b>PART 1 Homicide</b>				
45-5-102. Deliberate homicide	FELONY	X		
45-5-103. Mitigated deliberate homicide	FELONY	X		
45-5-104. Negligent homicide	FELONY		10 YRS	
45-5-105. Aiding or soliciting suicide	FELONY	X		
45-5-106. Vehicular homicide while under influence	FELONY		10 YRS	
<b>PART 2 Assault and related offenses</b>				
45-5-201. Assault	MISDEMEANOR			
45-5-202. Aggravated Assault	FELONY	X		
45-5-203. Intimidation	FELONY	X		
45-5-204. Mistreating prisoners	FELONY	X		
45-5-205. Negligent vehicular assault				
(w/o serious bodily injury)	MISDEMEANOR		5 YRS	
(causing serious bodily injury)	FELONY		10 YRS	
45-5-206. Partner or family member assault				
(first offense)	MISDEMEANOR			
(second offense)	MISDEMEANOR			
(third or subsequent offense)	FELONY	X		
45-5-207. Criminal endangerment	FELONY		5 YRS	
45-5-208. Negligent endangerment	MISDEMEANOR			
45-5-209. Partner or family member assault -- no contact order	MISDEMEANOR			
45-5-210. Assault on peace officer or judicial officer				
(w/o serious bodily injury)	FELONY	X		
(causing serious bodily injury)	FELONY	X		
45-5-211. Assault upon sports official	MISDEMEANOR			
45-5-212. Assault on minor	FELONY	X		
45-5-213. Assault with weapon	FELONY	X		
45-5-214. Assault with bodily fluid	MISDEMEANOR			
45-5-220. Stalking				
(first offense)	MISDEMEANOR			
(second or subsequent offense)	FELONY	X		
45-5-221. Malicious intimidation or harassment relating to civil or human rights	FELONY	X		
45-5-223. Surreptitious visual observation or recording				
(place of residence first offense)	MISDEMEANOR			
(place of residence second offense)	MISDEMEANOR			
(place of residence third or subsequent offense)	FELONY	X		
(public establishment - adult)	MISDEMEANOR			
(public establishment - minor)	FELONY	X		
<b>PART 3 Kidnapping</b>				
45-5-301. Unlawful restraint	MISDEMEANOR			
45-5-302. Kidnapping	FELONY	X		
45-5-303. Aggravated kidnapping	FELONY	X		
45-5-304. Custodial interference	FELONY		5 YRS	
45-5-305. Subjecting another to involuntary servitude	FELONY	X		
(including aggravated kidnapping, sexual intercourse w/o consent or deliberate homicide)	FELONY	X		
45-5-306. Trafficking of persons for involuntary servitude	FELONY	X		
(including aggravated kidnapping, sexual intercourse w/o consent or deliberate homicide)	FELONY	X		
<b>PART 4 Robbery</b>				
45-5-401. Robbery	FELONY	X		
<b>PART 5 Sexual Crimes</b>				
45-5-502. Sexual Assault	MISDEMEANOR			
(victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury)	FELONY		10 YRS	
45-5-503. Sexual intercourse without consent	FELONY	X		
45-5-504. Indecent exposure				
(first offense)	MISDEMEANOR			
(second offense)	MISDEMEANOR			
(third or subsequent offense)	FELONY		5 YRS	
45-5-505. Deviate sexual conduct	unconstitutional law			
45-5-507. Incest				

SJ7 - Disqualifying Events  
Criminal Background Checks  
Updated: 4/4/2008

Prepared for the SJ7 Workgroup Meeting April 2008  
Recommendations of DPHHS and DOJ staff

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
(victim is less than 16 years old and the offender is 3 or more years older than the victim or if the offender inflicts bodily injury)	FELONY	X		
* there are several different sentencing guidelines, but the minimum is 2 years and thus a felony				
<b>PART 6 Offenses Against the Family</b>				
45-5-601. Prostitution	MISDEMEANOR			
(prostitute client first offense)	MISDEMEANOR			
(prostitute client second or subsequent offense)	FELONY		5 YRS	
(prostitute under 12 and client over 18)	FELONY	X		
45-5-602. Promoting prostitution		X		
(prostitute under 12 and client over 18)	FELONY	X		
45-5-603. Aggravated promotion of prostitution		X		
(prostitute under 18)	FELONY	X		
(prostitute under 12 and client over 18)	FELONY	X		
45-5-611. Bigamy	MISDEMEANOR			
45-5-612. Marrying a bigamist	MISDEMEANOR			
45-5-621. Nonsupport	MISDEMEANOR			
(aggravated nonsupport)	FELONY		5 YRS	
45-5-622. Endangering welfare of children	MISDEMEANOR			
(3) Methamphetamine Endangerment)	FELONY		10 YRS	
45-5-623. Unlawful transactions with children	MISDEMEANOR			
45-5-624. Unlawful attempt to purchase or possession of intoxicating substance	MISDEMEANOR			
45-5-625. Sexual abuse of children	FELONY	X		
(victim under 16)	FELONY	X		
(possession of materials)	FELONY	X		
(victim under 12 and offender over 18)	FELONY	X		
45-5-626. Violation of order of protection		X		
(first and second offense)	MISDEMEANOR			
(third or subsequent offense)	FELONY		10 YRS	
45-5-627. Ritual abuse of minor				
(first offense)	FELONY	X		
(second or subsequent offense)	FELONY	X		
45-5-631. Interference with parent-child contact	MISDEMEANOR			
45-5-632. Aggravated interference with parent-child contact	MISDEMEANOR			
45-5-634. Parenting interference	FELONY		5 YRS	
45-5-637. Tobacco possession or consumption by persons under 18 years of age prohibited	MISDEMEANOR			
<b>Chap 6 -- Offenses Against Property</b>				
<b>PART 1 Criminal Mischief and Arson</b>				
45-6-101. Criminal mischief	MISDEMEANOR			
(injures or kills animal or causes a substantial interruption of public services)	FELONY		5 YRS	
45-6-102. Negligent Arson	MISDEMEANOR			
(places person in danger of serious bodily injury or death)	FELONY	X		
45-6-103. Arson	FELONY	X		
45-6-104. Desecration of capitol, place of worship, cemetery, or public memorial				
(greater than \$1,000 in damages)	FELONY		5 YRS	
45-6-105. Criminal destruction of or tampering with communication device	MISDEMEANOR			
<b>PART 2 Criminal trespass and burglary</b>				
45-6-202. Criminal trespass to vehicles	MISDEMEANOR			
45-6-203. Criminal trespass to property	MISDEMEANOR			
45-6-204. Burglary	FELONY	X		
(aggravated burglary)	FELONY	X		
45-6-205. Possession of burglary tools	MISDEMEANOR			
<b>PART 3 Theft and Related Offenses</b>				
45-6-301. Theft	MISDEMEANOR			
(exceeding \$1,000 or of animal or of ammonia for manufacturing drugs)	FELONY		5 YRS	
(exceeding \$10,000)	FELONY	X		
45-6-302. Theft of lost or mislaid property	MISDEMEANOR			
45-6-303. Offender's Interest in the property (NOT A CRIME)				
45-6-305. Theft of labor or services or use of property	MISDEMEANOR			



SJ7 - Disqualifying Events  
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Prepared for the SJ7 Workgroup Meeting April 2008  
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Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-6-306. Obtaining communication services with intent to defraud (NOT A CRIME)				
45-6-307. Aiding the avoidance of telecommunications charges	MISDEMEANOR			
45-6-308. Unauthorized use of motor vehicles	MISDEMEANOR			
45-6-309. Failure to return rented or leased personal property (exceeding \$1,000)	MISDEMEANOR FELONY		5 YRS	
45-6-311. Unlawful use of a computer (exceeding \$1,000)	MISDEMEANOR FELONY			X
45-6-312. Unauthorized acquisition or transfer of food stamps (exceeding \$1,000)	MISDEMEANOR FELONY			X
45-6-313. Medicaid fraud (first & second offense)	MISDEMEANOR			
(third or subsequent offense)	MISDEMEANOR			
(exceeding \$1,000)	FELONY	X		
45-6-314. Theft by disposal of stolen property	MISDEMEANOR			
45-6-315. Defrauding creditors	MISDEMEANOR			
45-6-316. Issuing a bad check (exceeding \$1,000 or part of common scheme)	MISDEMEANOR FELONY		5 YRS	
45-6-317. Deceptive practices (exceeding \$1,000 or part of common scheme)	MISDEMEANOR FELONY		5 YRS	
45-6-318. Deceptive business practices	MISDEMEANOR			
45-6-319. Chain distributor schemes (second offense)	MISDEMEANOR FELONY		5 YRS	
45-6-325. Forgery (exceeding \$1,000 or part of common scheme)	MISDEMEANOR FELONY	X		
46-6-326. Obscuring the identity of a machine	MISDEMEANOR			
46-6-327. Illegal branding or altering or obscuring a brand	FELONY			X
46-6-332. Theft of identity (exceeding \$1,000)	MISDEMEANOR FELONY	X		
46-6-341. Money laundering (exceeding \$1,000 or part of common scheme)	MISDEMEANOR FELONY			X
<b>Chap 7 -- Offenses Against Public Administration</b>				
<b>PART 1 Bribery and Corrupt Influence</b>				
45-7-101. Bribery in official and political matters	FELONY			X
45-7-102. Threats and other improper influence in official and political matters	FELONY			X
45-7-103. Compensation for past official behavior	MISDEMEANOR			
45-7-104. Gifts to public servants by persons subject to their jurisdiction	MISDEMEANOR			
<b>PART 2 Perjury and Other Falsification in Official Matters</b>				
45-7-201. Perjury	FELONY			X
45-7-202. False swearing	MISDEMEANOR			
45-7-203. Unsworn falsification to authorities	MISDEMEANOR			
45-7-204. False alarms to agencies of public safety	MISDEMEANOR			
45-7-205. False reports to law enforcement authorities	MISDEMEANOR			
45-7-206. Tampering with witnesses and informants	FELONY			X
45-7-207. Tampering with or fabricating physical evidence	FELONY			X
45-7-208. Tampering with public records or information	FELONY			X
45-7-209. Impersonation of public servant	FELONY			X
45-7-210. False claim to public agency (exceeding \$1,000 or part of common scheme)	MISDEMEANOR			
<b>PART 3 Obstructing Governmental Objectives</b>				
45-7-301. Resisting arrest	MISDEMEANOR			
45-7-302. Obstructing peace officer or other public servant	MISDEMEANOR			
45-7-303. Obstructing justice	MISDEMEANOR			
45-7-304. Failure to aid a peace officer	MISDEMEANOR			
45-7-305. Compounding a felony	MISDEMEANOR			
45-7-306. Escape (after being charged w/ or convicted of felony)	MISDEMEANOR FELONY			X
(use of threat of force or physical violence)	FELONY			X
45-7-307. Transferring illegal articles -- unauthorized communication (not weapon or drug; person not in prison)	MISDEMEANOR			
(not weapon or drug; person in prison)	MISDEMEANOR			

SJ7 - Disqualifying Events  
Criminal Background Checks  
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Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
(drug; person in prison)	FELONY			X
(weapon; person in prison)	FELONY			X
45-7-308. Bail-jumping	MISDEMEANOR			
(in connection with felony)	FELONY			X
45-7-309. Criminal contempt	MISDEMEANOR			
PART 4 Official Misconduct				
45-7-401. Official Misconduct	MISDEMEANOR			
PART 5 Employer Misconduct				X
45-7-501. Employer Misconduct	FELONY			X
Chap 8 -- Offenses Against Public Order				
PART 1 Conduct Disruptive of Public Order				
45-8-101. Disorderly Conduct	MISDEMEANOR			
45-8-102. Failure of disorderly persons to disperse	MISDEMEANOR			
45-8-103. Riot	MISDEMEANOR			
(while incarcerated)	FELONY			X
45-8-104. Incitement to riot	MISDEMEANOR			
(while incarcerated)	FELONY			X
45-8-105. Criminal incitement	FELONY			X
45-8-106. Bringing armed men into the state	FELONY			X
45-8-109. Civil disorder -- prohibited activities	FELONY			X
45-8-110. Obstructing health care facility access	MISDEMEANOR			
45-8-111. Public nuisance	MISDEMEANOR			
45-8-112. Action to abate a public nuisance (NOT A CRIME)				
45-8-113. Creating a hazard	MISDEMEANOR			
45-8-114. Failure to yield party line	MISDEMEANOR			
45-8-115. Illegal posting of state and federal line	MISDEMEANOR			
45-8-116. Funeral picketing -- penalties	MISDEMEANOR			
PART 2 Offensive, indecent and inhumane conduct				
45-8-201. Obscenity	MISDEMEANOR			
45-8-208. Penalties for 45-8-206. Public display or dissemination of obscene material to minors	MISDEMEANOR			
45-8-209. Harming a police dog -- penalty	MISDEMEANOR			
45-8-210. Causing animals to fight -- owners, trainers, and spectators	FELONY			X
45-8-211. Cruelty to animals -- exceptions	MISDEMEANOR			
(second or subsequent offense or aggravated)	FELONY		10 YRS	
45-8-212. Criminal defamation	MISDEMEANOR			
45-8-213. Privacy in communications	MISDEMEANOR			
(second offense)	MISDEMEANOR			
(third or subsequent offense )	FELONY			X
45-8-214. Bribery in contests	FELONY			X
45-8-215. Desecration of flags	FELONY			X
45-8-216. Unlawful automated telephone solicitation	MISDEMEANOR			
45-8-217. Aggravated animal cruelty	FELONY		10 YRS	
45-8-220. Criminal invasion of personal privacy	MISDEMEANOR			
PART 3 Weapons				
45-8-303. Possession or use of machine gun in connection with a crime	FELONY			X
45-8-304. Possession or use of a machine gun for offensive purpose	FELONY			X
45-8-305. Presumption of offensive or aggressive purpose (NOT A CRIME)				
45-8-313. Unlawful possession of firearm by convicted person	no statutory penalty			
45-8-314. Lifetime firearms supervision of certain convicted person (NOT A CRIME)				
45-8-316. Carrying concealed weapons	MISDEMEANOR			
(second offense)	FELONY			X
45-8-318. Possession of deadly weapon by prisoner or youth in facility	FELONY			X
45-8-327. Carrying a concealed weapon while under the influence	MISDEMEANOR			
45-8-328. Carrying a concealed weapon in prohibited place	MISDEMEANOR			
45-8-331. Switchblade knives	MISDEMEANOR			
45-8-333. Reckless or malicious use of explosives	MISDEMEANOR			
45-8-334. Possession of a destructive device	FELONY			X
45-8-335. Possession of explosives	FELONY			X
45-8-336. Possession of a silencer	FELONY			X



SJ7 - Disqualifying Events  
Criminal Background Checks  
Updated: 4/4/2008

Prepared for the SJ7 Workgroup Meeting April 2008  
Recommendations of DPHHS and DOJ staff

Montana Crimes	Felony/Misdemeanor	Permanent Disqualifier	Aged out offenses	Not Considered
45-8-339. Carrying firearms on trains -- penalty	MISDEMEANOR			X
45-8-340. Sawed-off firearm (second offense)	MISDEMEANOR FELONY			X
45-8-361. Possession or allowing possession of weapon in school building	MISDEMEANOR			
<b>Chap 9 - Dangerous Drugs</b>				
<b>PART 1 Offenses involving Dangerous Drugs</b>				
45-9-101. Criminal distribution of dangerous drugs	FELONY		10 YRS	
45-9-102. Criminal possession of dangerous drugs	////////////////////////////////////			
marijuana and anabolic steroids	MISDEMEANOR			
opiate	FELONY		5 YRS	
marijuana (second offense)	FELONY		5 YRS	
not otherwise provided	FELONY		5 YRS	
45-9-103. Criminal possession with intent to distribute				
opiate	FELONY		5 YRS	
not otherwise provided	FELONY		5 YRS	
45-9-104. Fraudulently obtaining dangerous drugs	FELONY		10 YRS	
(second offense)	FELONY		10 YRS	
45-9-105. Altering labels on dangerous drugs	MISDEMEANOR			
45-9-107. Criminal possession of precursors to dangerous drugs	FELONY		5 YRS	
45-9-109. Criminal distribution of dangerous drugs on or near school property	FELONY		10 YRS	
45-9-110. Criminal production or manufacture of dangerous drugs	FELONY		10 YRS	
45-9-112. Criminal distribution of imitation dangerous drug	FELONY		10 YRS	
(distribution to person over 18)	FELONY		10 YRS	
(distribution to person under 18)	FELONY		10 YRS	
45-9-113. Criminal possession of imitation dangerous drug with the purpose to distribute	FELONY		10 YRS	
45-9-114. Criminal advertisement of imitation dangerous drug	FELONY		10 YRS	
45-9-115. Criminal manufacture of imitation dangerous drug	FELONY		10 YRS	
45-9-121. Criminal possession of toxic substances	MISDEMEANOR			
45-9-125. Continuing criminal enterprise	FELONY			X
45-9-127. Carrying dangerous drugs on train	see penalty at 45-9-102			
45-9-132. Operation of unlawful clandestine laboratory	FELONY		10 YRS	
<b>Title 61 - Driving Under the Influence of Alcohol or Drugs (61-8-401)</b>				
(first - third offense - 61-8-714)	MISDEMEANOR			
(fourth or subsequent offense - 61-8-731)	FELONY		10 YRS	
<b>Title 52, Chapter 3, Part 8 - Montana Elder and Persons With Developmental Disabilities Abuse Prevention Act</b>				
52-3-825. Penalties				
(1) failing to make a report, failing to disclose contents of case record or report	MISDEMEANOR			
(2)(a) abuse, sexual abuse or neglect	FELONY	X		
(2)(b)(i) negligent abuse (first offense)	MISDEMEANOR			
(2)(b)(ii) negligent abuse (second or subsequent offense)	FELONY	X		
(3)(a) exploiting in amount of \$1,000 or less	MISDEMEANOR			
(3)(a) exploiting in amount of \$1,000 or more	FELONY	X		
<b>Title 33, Chapter 1, Part 12 - Insurance Fraud Protection</b>				
33-1-1211. Penalties.	MISDEMEANOR			
<b>Title 53, Chapter 2, Part 1 - Social Services Institution, Administration of Public Assistance, General Provisions</b>				
53-2-106. Penalty for misuse of public assistance information	MISDEMEANOR			
53-2-107. Fraudulent obtaining of public assistance treated as theft				

## **SJ 7--Examination of Requiring Criminal Background Checks for Direct Care Workers**

### **10 State Summary of Data Collection Regarding Appeals Processes and Recommendation for Appeals Process in Montana**

**March 2008**

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#### **10 State Summary:**

1. 7 States have an identified Appeal Processes (Alaska, Arizona, Idaho, Minnesota, New Mexico, Oklahoma and Oregon)
  - a. 3 limit the appeal to crimes which fall outside of their 'permanent' categories.
  - b. 4 use a committee structure to make decisions, while the other three involve a Commissioner or other designated department staff person.
  - c. 1 state limits appeals to areas involving their central abuse registries.
2. 2 States (Kansas and Nevada) limit the appeal process to the accuracy of the criminal record only. No other considerations are allowed.
3. 1 State—no response, nothing specific found in their on-line statutes.

#### **Discussion:**

During the February 2008 meeting, members reviewed the above information and requested follow up regarding the following questions:

1. Of the states above who limit their appeal to the criminal record only, how many people actually appeal the record? Of that number, how many are reconsidered?
  2. Of the states that have a formal appeals process, how many appeals are conducted?
  3. Of the states that have a formal process, what is the cost associated?
-

# SJ 7--Examination of Requiring Criminal Background Checks for Direct Care Workers

## 10 State Data Collection Regarding Appeals Processes January 2008

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### Alaska

- A. Appeals process is referred to as a *Request for Variance*.
- B. Appeals can only apply to crimes that are specified under the 10, 5, 3, or 1 year aged out categories. Appeals cannot be requested for those crimes listed as Permanent.

Number of appeals: 2 appeals in 2.5 years.

### Arizona

- A. Appeal process is known as *Good Cause Exception*.
- B. Every 'clearance' is based upon the issuance of a Fingerprint Clearance Card.
- C. Clearance is sought through the Board of Fingerprinting, which is part of the state Department of Public Safety.
- D. It appears that this division has a 'clearing house' system and compares the criminal record to the offenses that preclude a person from receiving a fingerprint clearance card.

\* There were some inconsistent numbers between the two agencies contacted.

Arizona Department of Public Safety: Calendar year 2007

- Number of applications completed: —18,019
- Number of 'clean applications'—16,636
- Number of restricted clearances—283
- Number of denials—1100

Arizona Board of Fingerprinting:

The Board of Fingerprinting believes the number of denials is closer to 4000.

In FY 2007 they received 3236 requests for applications; these requests come from individuals whose card has been denied or suspended.

Of these, 92.73 % were approved. Over the years the approval rate has been as high as 80-90%.

Most approvals are actually made at an administrative level, with 20% being made through a formal hearing.

There are circumstances where an individual has been given a good cause exception and later commits an offense. The Board of Fingerprinting indicates there have only been a few dozen of these cases over the last several years.

%age of applications that were disqualified:	22%
%age of denials that were appealed:	80%



## Kansas

The State of Kansas does not have an appeal process. There has so far been sort of a conscious effort to avoid establishing any type of appeals process. Kansas allows the individual to follow the appeal process established through the criminal justice legal system. If they are successful in getting a conviction overturned or expunged then officials will rescind the prohibition. Kansas does see a few criminal records that have been expunged each year on individuals that have been previously prohibited.

Number of appeals (for record expunged) in last year:	10
Number of appeals which were successful:	4

Individuals must file a court fee of approximately \$150.00 to have record expunged; they would also have to hire an attorney.

## Idaho

- A. Appeals process is referred to as *Exemption Reviews*
- B. An individual can only request a review of a conditional denial (this would be like what we're referring to as "other than permanent" disqualifier). If a disqualifier falls into the 'unconditional' category, Idaho does not allow a review to occur.

### FY2007

Number of Applications:	27,799
Number of Applicants fingerprinted:	23,413
Number of Applicants who withdrew:	169
(These are people who come in to their fingerprint appointment, have disclosed a disqualifying offense, and decide to withdraw, rather than receive an Unconditional Denial.)	
Unconditional Denials Issued for Permanent disqualifying offenses:	73
Unconditional Denials issued for 5 yr disqualifying offenses	98
* %age of applications disqualified	.6%

Number of appeals:	10
Number of individuals who were successful at getting crimes expunged:	5
Number of Conditional Denials Issued:	149
(these are people who we found either a child protection case, or adult protection case, but did not have a disqualifying crime. These individuals had the opportunity to request an exemption review in order to explain their issue and show rehabilitation.)	
Number who did not request an exemption review and remained denied:	21
*%age of denials appealed:	5.8%

Number of Exemptions Granted:	91
Exemptions Denied:	37
Number who appealed through formal contested case hearing:	3
Number of appeal decisions upheld:	3

### Minnesota

- A. Appeals process is referred to as *Reconsideration*.
- B. Minnesota, depending upon the program, has several sources who make the disqualification determination—county agency, Commissioner of State Department, and private agencies (i.e., adoption...). *However the Commissioner is the only one that makes the decision to offer reconsideration. The Commissioner not only reviews criminal disqualifications, but also reviews disqualification concerning Maltreatment (is similar to our child and family services reviews) and disqualification concerning adoption/foster care family studies.*

Number of background checks completed:	226,000
Number resulting in disqualification:	7208 (3.1%)
Number of appeals:	2873 (40%)
Number of appeals that were given reconsideration:	2086 (72.6%)

### Nevada

Upon receiving information from their Central Repository of Criminal Records, any employee or independent contractor who has been convicted of a disqualifying crime shall be terminated from employment or not allowed to begin employment. The only 'appeal' is regarding the accuracy of the criminal record. According to the state law information, if the individual in question has already begun employment when the disqualifying criminal history is found, that person has a reasonable amount of time of not less than 30 days to correct the information. If the information cannot be changed or corrected, the person is terminated from employment.

Department of Public Safety conducts the review; the health agency receives a 'thumbs up/down'.

Number of Checks completed:	21,374
(with approx. 3% failing either or both of the state or federal check)	

Number disqualified:	421 (1.9%)
Number of appeals:	62 (14%)
Number reversed:	16 (25%)

### New Mexico

- A. Appeals process is referred to as *Administrative Reconsideration*.
- B. An individual who has received notification of a disqualifying criminal history record, may submit a written request for administrative reconsideration.

\* Information was not available from New Mexico.

### Oklahoma

- A. Licensed professionals are required as a condition of their license to undergo a criminal background check; as a result, Oklahoma limits background checks to persons designated as nurse aides and 'non-technical' workers.
- B. From the research conducted, it appears there is no formal appeal process with regard to criminal history disqualifiers, but the appeal process appears to apply to their abuse registry.

\* Information was not available from Oklahoma.

### **Oregon**

- A. All crimes listed in the statute are considered 'potentially' disqualifying, regardless of their permanent or aged out status.
- B. When an individual applies to be an employee in a facility, he/she undergoes a "fitness determination", which appears to include a review of the criminal record and other considerations. This is conducted by authorized entity which usually is the facility contact but can be the department in specific situations. If the individual does not have a criminal history, and the record check shows no other considerations, the individual can be approved.

**\* Information was not available from Oregon.**

### **Summary:**

Only 4 of the 10 states gave us detailed and consistent information concerning the numbers of applications, the numbers denied and then those denials which resulted in appeal. Therefore, for the purposes of this summary, the department relied upon the information from those 4 states only.

An approximate combined total of 300,000 applications were made in these 4 states. Of those applications 11,800 applications (4%) resulted in denials due to disqualifiers.

Of the 11,800 denied applications, approximately 6181 or 52% were appealed.

# **SJ 7--Examination of Requiring Criminal Background Checks for Direct Care Workers**

## **Appeals Processes Recommendation for Appeals Process in Montana**

**April 2008**

### **10 STATE SUMMARY: FROM JANUARY 2008**

Seven (7) States have an identified Appeal Processes (Alaska, Arizona, Idaho, Minnesota, New Mexico, Oklahoma and Oregon)

- Three (3) States limit the appeal to crimes which fall outside of their 'permanent' categories.
- Four (4) States use a committee structure to make decisions, while the other three involve a Commissioner or other designated department staff person.
- One (1) State limits appeals to areas involving their central abuse registries.

Two (2) States (Kansas and Nevada) limit the appeal process to the accuracy of the criminal record only. No other considerations are allowed.

One (1) State - no response, nothing specific found in their on-line statutes.

During the discussion at the February 2008 SJ7 workgroup meeting, the workgroup was presented a proposal to follow the strategies of Kansas and Nevada and adopt a process which limits any "appeal" to the accuracy of the criminal history record only. This proposal was discussed and rejected by the workgroup and the department staff was directed to prepare an appeals process for Montana that would allow an applicant the ability to not only appeal the accuracy of the criminal history record but also appeal a notification of a disqualifying criminal history record.

Based upon this direction the department has reviewed the information obtained from the 10 States identified by the workgroup and prepared the following recommendation for an Appeals Process for Montana.

### **APPEALS PROCESS FOR MONTANA**

#### Appeal the accuracy of the criminal history record Department of Justice (DOJ)

Montana will allow the individual to follow the appeal process established through the criminal justice legal system. This appeal process will be defined by the Montana Department of Justice (DOJ). If an applicant is successful in getting a conviction overturned or expunged then DPHHS officials will rescind the prohibition under Montana law.

If a person challenges a denial of an opportunity to volunteer or be employed by the authorized entity on the basis of a criminal history background check result, the person can be provided a copy of the criminal history record after verifying their identity. If a person believes their criminal history record is in error, they must contact DOJ for assistance in correcting the error.

Procedures for challenging and correcting criminal record information are contained in MCA 44-5-215. There is a \$10.00 charge if fingerprint verification required for a Montana record; \$18.00 if for a FBI record.

Appeal a notification of a disqualifying criminal history record  
Department of Public Health and Human Services (DPHHS)

1. Appeal the notification of a disqualifying criminal history record directly to the Quality Assurance Division (QAD) who will be responsible for program administration. The appeal process will be referred to as "Administrative Reconsideration (AR)". This process is intended to be an informal non-adversarial administrative review of written documentation
2. QAD program will conduct an Administrative Reconsideration on the basis of the applicability to the law and requirements for disqualification based upon the criminal history record. This review will be based upon the written and complete request for reconsideration and all supporting documents (see below) submitted. Additional documentation can be requested by the department.
3. The appeal will not be allowed based upon the provider's determination of employment.
4. Appeal will be based upon the applicant's ability to demonstrate sufficient rehabilitation to warrant the public's trust.
5. QAD will initiate a Joint Review of all requests for AR and determine an: Approval of the AR or Denial of the AR. This committee for this Joint Review will be defined by Administrative Rule.
6. All denials will require a peer review by a professional in the criminal justice system (TBD).
7. All AR denials will be provided the right to appeal the decision and request a "Fair Hearing". The Fair Hearing will be conducted by the Office of Fair Hearings at DPHHS in accordance with the Montana Administrative Procedure Act (MAPA) and the Department's Administrative Rules of Montana. The Hearing Officer will have the ability to uphold the AR denial or overturn the AR denial, based upon the evidence presented in accordance with 2-4-612, MCA.
8. A party who is aggrieved by a final Fair Hearing decision may seek judicial review.

All approval determinations are limited to the application of the disqualifications based upon the criminal history record as contained in the law or administrative rule and will not be a determination to require an employer to hire an applicant. All decisions regarding the employment of an applicant are at the employer's discretion. All applicable state and federal laws regarding discrimination and civil rights apply.

Montana will use a documentation requirements and process that is similar to that used by the State of New Mexico.

***Administrative Reconsideration*** - An individual, who has received notification of a disqualifying criminal history record, must submit a written request for administrative reconsideration.

The documentation submitted with the request for an administrative reconsideration must include the following:

1. A comprehensive rationale for why the AR should be granted;
2. A demonstration that in spite of the conviction, the health, safety and welfare of recipients will not be impacted;
3. Letters of recommendation from credible persons not related to the individual;
4. Credible and reliable evidence of the actual disposition of any arrest for which the nationwide criminal history was incomplete;
5. The age of the individual at the time of each disqualifying conviction;

6. Any mitigating circumstances when the offense was committed;
7. Any court imposed sentence or punishment and if completed, the date of completion;
8. Any successfully completed rehabilitation program since the offense;
9. The individuals full employment history since the disqualifying convictions; and
10. Other relevant materials the individual may wish to submit.

Factors in Making Determination:

1. Must consider the "Act" as defined by the legislature (TBD);
2. The severity or nature of the crime or other findings;
3. Total number of disqualifying convictions and pattern of incidents;
4. Time elapsed since last disqualifying conviction or since discharge of the sentence;
5. Circumstances surrounding the incident that would help determine the risk of repetition;
6. Circumstances of the crime including whether violence was involved;
7. Relationship of the incident to the care of children or vulnerable adults;
8. Activities evidencing rehabilitation (substance abuse or other rehab programs);
9. Whether conviction was expunged by the court or whether an unconditional pardon was granted;
10. False or misleading statements about any conviction in the signed declaration;
11. Evidence that the individual poses no risk of harm to the health and safety of care recipients;
12. Age of the individual at time of the disqualifying conviction;
13. Granting of a pardon by the Governor or President; or
14. The falsification or omission of information on the application form and other supplemental forms submitted.

Grounds for Reconsideration Clearance Determination: Clearance can be given when the request for reconsideration and the accompanying documentation clearly demonstrates that the individual has satisfied *one* of the following grounds for such clearance:

1. Inaccuracy - The record inaccurately reflects a disqualifying conviction. Includes factual error, error in the departments application or use of the applicable criminal statute/standard, conviction that lacks a final disposition
2. No Risk of Harm

DPHHS will refine and define this process through the Administrative Rule process as granted in the Act.



## SJ 7 Options for Background Checks Disqualifying Events Exist for All Options

### Option 1

#### Full Fingerprint Background Check

- Staff for all designated service providers would be subject to fingerprint checks
- Checks could be National (FBI) or Western Identification Network WIN states only (Alaska, Utah, Wyoming, Nevada, Oregon, Idaho, Montana)
- Establishes a registry of all direct care access workers' fingerprint check results

### Option 2

#### Criminal Background Check Required & the State Prescribes a Process of a Progressive Check

- Establishes a risk analysis process for criminal background checks beginning with a name based check through the DOJ
- Staff for all designated service providers would be subject to checks
- Begin with a name based check if applicant has lived only in MT for the past 5-10 years
- If the name based check reveals any criminal activity, a full fingerprint background check is required.
- If the applicant has moved to MT within the last 5 -10 years and is from a WIN state, a WIN state fingerprint check is required
- If the applicant has moved to MT within the last 5 – 10 years and is from a non WIN state, a full FBI fingerprint check is required

### Option 3

Some type of Criminal Background Check Required. Employer has policies and procedures to determine their process. DPHHS will explain possibilities but the employer will decide.

- Staff for all designated service providers would be subject to checks
- Possibilities include named based check, use of a private background check co., WIN state check, full FBI check.
- Reference checks alone are not sufficient
- If the applicant is from another state, a MT name based check is not sufficient



## SJ 7 Options for Background Checks Disqualifying Events Exist for All Options

OPTION 1	OPTION 2	OPTION 3
<p><b>Pros</b></p> <ul style="list-style-type: none"> <li>* Extends beyond current requirements for licensing requirements</li> <li>* Fingerprints provide the most reliable result to identify an individual</li> <li>* Alerts employer to inaccurate information provided such as misspelled names and inaccurate SSN</li> <li>* Includes aliases, charges pending</li> <li>* Does not preclude the employer from performing an additional type of background check</li> <li>* Only method available to obtain a national check</li> </ul> <p><b>Cons</b></p> <ul style="list-style-type: none"> <li>~ Cost of processing the check &amp; the variable cost of obtaining fingerprints</li> <li>~ May create fear about privacy issues and the security of the results</li> <li>~ Requires an administrative process for handling the information</li> <li>~ Increased workload and fiscal impact to DOJ</li> <li>~ Considered invasive by some</li> <li>~ May deter applicants because of waiting period for prints to be processed</li> <li>~ May present a burden to employer due to timeliness of fingerprint process.</li> <li>~ Fingerprints might need to be rerolled, and for a select few, fingerprints will be impossible to obtain. At that point, a Federal name based check would be completed.</li> <li>~ Requires statutory change to meet PL 92-544 requirements</li> </ul>	<p><b>Pros</b></p> <ul style="list-style-type: none"> <li>* Extends beyond current requirements for licensing requirements</li> <li>* Not as invasive to MT residents</li> <li>* Should capture those coming from another state with a criminal history</li> <li>* Turn around time for name based checks may be faster than fingerprints</li> <li>* Does not preclude the employer from performing an additional type of background check</li> <li>* May be less costly than Option 1</li> <li>* May be more timely than Option 1</li> <li>* If fingerprints are required, the same Pros as Option 1 would apply</li> <li>* Empowers employers to direct their own hiring practices</li> </ul> <p><b>Cons</b></p> <ul style="list-style-type: none"> <li>~ MT name based check through DOJ only identifies crimes committed in MT</li> <li>~ May not identify a crime committed in another state even if perpetrator was a MT resident</li> <li>~ Might require start-up education &amp; training for employers</li> <li>~ Requires a risk analysis by the employer to determine MT residency</li> <li>~ If fingerprints are required, the same cons as Option 1 would apply</li> <li>~ Name based checks are subject to the accuracy of the information provided by the applicant; increased chance of false or missed matches</li> <li>~ Employer will be required to benchmark a crime against a list of disqualifying events</li> <li>~ May take more time &amp; resources in managing and verifying information provided by applicant</li> <li>~ Requires statutory change to meet PL 92-544 requirements if fingerprint based</li> </ul>	<p><b>Pros</b></p> <ul style="list-style-type: none"> <li>* Extends beyond current requirements for licensing requirements</li> <li>* Based on self reported behavior</li> <li>* Gives employers discretion with their own hiring practices</li> <li>* Less costly than options 1 &amp; 2 both administratively (STATE) and to the employer; employer controls cost</li> <li>* Does not preclude the employer from performing an additional type of background check</li> <li>* May require less time to receive a report</li> </ul> <p><b>Cons</b></p> <ul style="list-style-type: none"> <li>~ Requires that employer make a risk assessment of the applicant and the appropriate type of check needed to ensure resident/patient/client safety</li> <li>~ Inconsistent process with services delivery providers</li> <li>~ Least dependable of the three options for providing accurate information regarding criminal history</li> <li>~ MT name based check through DOJ only identifies crimes committed in MT</li> <li>~ Some employers may not be as diligent as others, and the vulnerable populations may be at risk</li> <li>~ Name based checks are subject to the accuracy of the information provided by the applicant</li> <li>~ Requires a risk analysis by the employer to determine MT residency</li> <li>~ May be less portable if employee moves to another facility since no registry exists</li> <li>~ Private background check co. unable to access information from the 7 states that do not share criminal conviction information</li> <li>~ Requires statutory change to meet PL 92-544 requirements if fingerprint based</li> </ul>

SJ 7 Workgroup - Meeting #4  
April 9th and 10th, 2008

Option 1 – Full Fingerprint Background Check  
Administrative and Process Discussion Items

Effective Date of Criminal Background Check Process – July 1, 2010

- January 2009-April 2009 – Legislative process to pass a bill
- April 2009 – June 2010 – Create infrastructure, rules, MOU, forms, data systems, staffing to implement program
- July 1, 2010 – Implement program requirements

Grandfathering Employees of record

- Effective date of the program – employees in covered service settings will be grandfathered and will not be required to have a criminal background check. A background check will be required on those employees if they change employers after the effective date of the new law. (Allows for a phased in approach)

Required background check will be Fingerprints

- Process for submitting fingerprints defined by DOJ requirements already in place.
- DOJ and DPHHS to provide training on fingerprint process to include options for obtaining prints and certifying entities to role prints.

Processing of Background Checks

- Conducted by Department of Justice using existing processes.
- Requested background check submitted directly to DOJ using forms process TBD.
- Payment for the background check will be directly to DOJ. Payment arrangements TBD
- Results communicated to DPHHS under DOJ & DPHHS Memorandum of Understanding (MOU)
- DOJ – Destroys the fingerprint card
- DOJ completed initial review process to compare results against the list of disqualifying events.
- DPHHS completes a second review to verify results against list of disqualifying events. The process to apply the results of background check to the Montana list of disqualifying events will require a determination if crime in another state is “reasonably equivalent” to the crime listed under the Montana Statute. This will require legal assistance to review and make this determination. Will possibly require a development of a database to establish the relationships between the various state and federal laws.
- DPHHS maintains a database / registry of the background check (Details TBD)
- DPHHS sends formal letter to employee / employer regarding results indicating the check resulted in a disqualifying event including the evidence of criminal history reportable to the employer, or no reportable history.
- Copy of letter, with unique identifier number, will be retained for reference.
- Applicant of background check provided appeal rights regarding the results.
- DPHHS destroys copy of “rap sheet”

Notification

- Provided by letter to the applicant and copy provided to employer of record at the time background check requested.
- Possible secured website to provide results to applicant, prospective employers.

Length of time between checks – Frequency of checks

- Criminal background checks will be valid for a period of three (3) years.
- DPHHS will conduct internal verification and certification of the background check via direct inquiry through the Criminal Justice Information Network (CJIN).

- Fingerprint verification and certification will be required if the applicant was absent from the State for a period of time or the CJIN inquiry noted above indicates criminal history after the date of the most recent fingerprint check.
- Applicant letter is portable – to new employers, applicant and employers can request verification of previous background check from the registry.

#### Grace period for employment while background check is conducted

- Based upon the discretion of the employer. The employer may:
  1. Postpone or delay hiring pending the outcome of the criminal background check
  2. Hire under conditional employment (Probationary Period with supervision) pending the results of the background check. Presentation from DOJ indicated timeframe to complete the check is 4-10 days. Recommend production of fingerprint card to the employer or proof of previous background check prior to commencement of employment under probationary period.

#### Payment of background check

- Cost as identified by DOJ \$29.25 or \$25.25 for volunteer.
- Payment directly to DOJ
- Cost of obtaining fingerprints – Applicant
- Cost of fingerprint check – Applicant or employer (DOJ – Waive fee for financial hardships?)

#### Administrative costs DPHHS & DOJ.

- DOJ – TBD under existing authority.
- DPHHS – TBD after cost analysis pending direction of workgroup for administrative process.

#### Administrative Rule Authority

- Provide directed administrative rule authority to DPHHS and/or DOJ to define the timelines, forms, appeals process, and costs for the background checks.

#### Statutory Authority

- Requirement for the criminal background check in Montana
- Identify the Service settings and definitions who this requirement applies.
- Identify and define the disqualifying events
- Effective dates
- Identify the shared administrative responsibility between DPHHS and DOJ
- Authority for the registry.
- Define the Appeals Process
- Advisory Council / Board or assignment of duties to an existing DPHHS board or council – Ex: Montana Health Coalition, other? This would provide added assurance regarding the development of rules and regulations regarding the administration of the program. Administrative rules for DPHHS are reviewed through the Interim Committee on Children Families Health and Human Services.
- Reporting of the program operations to a legislative interim committee.

SJ 7 Workgroup - Meeting #4  
April 9th and 10th, 2008

Option 2 – Criminal Background Check required & State prescribes a minimum process of a progressive check.  
Administrative and Process Discussion Items  
(Process very similar to Option 1)

Effective Date of Criminal Background Check Process – July 1, 2010

- January 2009-April 2009 – Legislative process to pass a bill
- April 2009 – June 2010 – Create infrastructure, rules, MOU, forms, data systems, staffing to implement program
- July 1, 2010 – Implement program requirements

Grandfathering Employees of record

- Effective date of the program – employees in covered service settings will be grandfathered and will not be required to have a criminal background check. A background check will be required on those employees if they change employers after the effective date of the new law. (Allows for a phased in approach)

Required background check process – State prescribes a minimum process of a progressive check that includes name based and Fingerprints.

- Name based checks required to be conducted via the DOJ website or in writing via DOJ. If name based check indicates criminal history then fingerprint check is required.
- Process for submitting fingerprints defined by DOJ requirements already in place.
- DOJ and DPHHS to provide training on DOJ resources for name based checks or fingerprint checks to include options for obtaining prints and certifying entities to role prints.

Processing of Background Checks

- Conducted by Department of Justice using existing processes.
- Requested background check submitted directly to DOJ using forms process TBD.
- Payment for the background check will be directly to DOJ. Payment arrangements TBD
- Fingerprint results communicated to DPHHS under DOJ & DPHHS Memorandum of Understanding (MOU)
- DOJ – Destroys the fingerprint card
- Fingerprint results DOJ complete initial review process to compare results against the list of disqualifying events.
- Fingerprint results DPHHS completes a second review to verify results against list of disqualifying events. The process to apply the results of background check to the Montana list of disqualifying events will require a determination if crime in another state is “reasonably equivalent” to the crime listed under the Montana Statute. This will require legal assistance to review and make this determination. Will possibly require a development of a database to establish the relationships between the various state and federal laws.
- Name based checks conducted by the employer can be communicated to DPHHS with the concurrence of the applicant for inclusion on the registry.
- DPHHS maintains a database / registry of the background check (Details TBD)
- DPHHS sends formal letter to employee / employer regarding results indicating the fingerprint check resulted in a disqualifying event including the evidence of criminal history reportable to the employer, or no reportable history.
- Copy of letter, with unique identifier number, will be retained for reference.
- Applicant of background check provided appeal rights regarding the results.
- DPHHS destroys copy of “rap sheet”

Notification

- Provided by letter to the applicant and copy provided to employer of record at the time background check requested.
- Possible secured website to provide results to applicant, prospective employers.

#### Length of time between checks – Frequency of checks

- Criminal background checks will be valid for a period of three (3) years.
- DPHHS will conduct internal verification and certification of the background check via direct inquiry through the Criminal Justice Information Network (CJIN).
- Fingerprint verification and certification will be required if the applicant was absent from the State for a period of time or the CJIN inquiry noted above indicates criminal history after the date of the most recent fingerprint check.
- Applicant letter is portable – to new employers, applicant and employers can request verification of previous background check from the registry.

#### Grace period for employment while background check is conducted

- Based upon the discretion of the employer. The employer may:
  1. Postpone or delay hiring pending the outcome of the criminal background check
  2. Hire under conditional employment (Probationary Period with supervision) pending the results of the background check. Presentation from DOJ indicated timeframe to complete the check is 4-10 days. Recommend production of fingerprint card to the employer or proof of previous background check prior to commencement of employment under probationary period.

#### Payment of background check

- Cost of name based check as defined by DOJ \$10.00 or \$11.50 if conducted on-line.
- Cost of fingerprint check as identified by DOJ \$29.25 or \$25.25 for volunteer.
- Payment directly to DOJ
- Cost of obtaining fingerprints – Applicant
- Cost of fingerprint check – Applicant or employer (DOJ – Waive fee for financial hardships?)

#### Administrative costs DPHHS & DOJ.

- DOJ – TBD under existing authority.
- DPHHS – TBD after cost analysis pending direction of workgroup for administrative process.

#### Administrative Rule Authority

- Provide directed administrative rule authority to DPHHS and/or DOJ to define the timelines, forms, appeals process, and costs for the background checks.

#### Statutory Authority

- Requirement for the criminal background check in Montana
- Identify the Service settings and definitions who this requirement applies.
- Identify and define the disqualifying events
- Effective dates
- Identify the shared administrative responsibility between DPHHS and DOJ
- Authority for the registry.
- Define the Appeals Process
- Advisory Council / Board or assignment of duties to an existing DPHHS board or council – Ex: Montana Health Coalition, other? This would provide added assurance regarding the development of rules and regulations regarding the administration of the program. Administrative rules for DPHHS are reviewed through the Interim Committee on Children Families Health and Human Services.
- Reporting of the program operations to a legislative interim committee.

SJ 7 Workgroup - Meeting #4  
April 9th and 10th, 2008

Option 3 – Criminal Background Check required. Employer required policies and procedures  
Administrative and Process Discussion Items

Effective Date of Criminal Background Check Process – July 1, 2010

- January 2009-April 2009 – Legislative process to pass a bill
- April 2009 – June 2010 – Create infrastructure, rules, MOU, forms, data systems, staffing to implement program
- July 1, 2010 – Implement program requirements

Grandfathering Employees of record

- Effective date of the program – employees in covered service settings will be grandfathered and will not be required to have a criminal background check. A background check will be required on those employees if they change employers after the effective date of the new law. (Allows for a phased in approach)

Required background check process – State requires employers to have a criminal background check process that must be contained in policies and procedures.

Processing of Background Checks

- Conducted by the individual employer.
- Employer completes a review to compare results against the list of disqualifying events. Can request departmental review for verification.
- The process to apply the results of background check to the Montana list of disqualifying events will require a determination if crime in another state is “reasonably equivalent” to the crime listed under the Montana Statute. This will require legal assistance to review and make this determination. Will possibly require a development of a database to establish the relationships between the various state and federal laws.
- Negative results of criminal background checks conducted by the employer required to be communicated to DPHHS with the concurrence of the applicant for inclusion on the registry.
- DPHHS maintains a database / registry of the background check (Details TBD). This would be a registry of individuals with disqualifying events that prohibit employment in the service settings as defined by this Act.
- DPHHS sends formal letter to employee / employer regarding results indicating the criminal background check resulted in a disqualifying event and their name will be placed on this registry.
- Applicant of background check provided appeal rights regarding the results and inclusion of name on the registry.
- Registry available on a website to provide resource for prospective employers.

Length of time between checks – Frequency of checks

- Criminal background checks will be required of all employers.

Grace period for employment while background check is conducted

- Based upon the discretion of the employer. The employer may:
  1. Postpone or delay hiring pending the outcome of the criminal background check
  2. Hire under conditional employment (Probationary Period with supervision) pending the results of the background check.

Payment of background check

- Responsibility of the employer.
- Cost of name based check as defined by DOJ \$10.00 or \$11.50 if conducted on-line.



- Cost of fingerprint check as identified by DOJ \$29.25 or \$25.25 for volunteer.
- Payment directly to DOJ
- Cost of obtaining fingerprints ~ Applicant

#### Administrative costs DPHHS & DOJ.

- DOJ – TBD under existing authority.
- DPHHS – TBD after cost analysis pending direction of workgroup for administrative process.

#### Administrative Rule Authority

- Provide directed administrative rule authority to DPHHS and/or DOJ to define the timelines, forms, appeals process, and costs for the background checks.

#### Statutory Authority

- Requirement for the criminal background check in Montana
- Identify the Service settings and definitions who this requirement applies.
- Identify and define the disqualifying events
- Effective dates
- Identify the shared administrative responsibility between DPHHS and DOJ
- Authority for the registry.
- Define the Appeals Process
- Advisory Council / Board or assignment of duties to an existing DPHHS board or council – Ex: Montana Health Coalition, other? This would provide added assurance regarding the development of rules and regulations regarding the administration of the program. Administrative rules for DPHHS are reviewed through the Interim Committee on Children Families Health and Human Services.
- Reporting of the program operations to a legislative interim committee.